CONFIDENTIAL ATTORNEY WORK PRODUCT

MEMORANDUM

To: ACLU SoCal First Amendment and Democracy Team
From: Hanna Bayer, Advocacy Intern
Date: July 29th, 2022
Re: Minority Political Cohesion under Prong 2 of the *Gingles* Factors

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QUESTION PRESENTED

When assessing whether a minority group is politically cohesive in an action under Section 2 of the federal Voting Rights Act of 1965, 52 U.S.C. § 10301 *et seq*. ("VRA" or "Act"), how do courts treat elections where the minority group splits their vote among multiple minority candidates?

ANALYSIS

I. Background

Section 2 of VRA prohibits political subdivisions from imposing voting standards, practices, or procedures in a manner that results in a denial or abridgment of the right of any citizen to vote on account of race, color, or language. 52 U.S.C. § 10301(a). A plaintiff may bring a Section 2 claim to challenge a district map where "the manipulation of districting lines fragments politically cohesive minority voters among several districts or packs them into one district or a small number of districts, and thereby dilutes the voting strength of members of the minority population." *Shaw v. Hunt*, 517 U.S. 899, 914 (1996). To establish a Section 2 violation, a plaintiff needs to satisfy three preconditions: (1) that the minority group is "sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) that the minority group is "politically cohesive"; and (3) that "the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances[—]to usually defeat the minority's preferred candidate." *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986). Together, the second and third factors describe racially polarized voting, or RPV. *Ruiz v. City of Santa Maria*, 160 F.3d 543, 551 (9th Cir. 1998) (per curiam). The second *Gingles* prong is the focus of this memorandum.

In *Gingles*, the Supreme Court explained that if a minority group is not a politically cohesive unit, "as would be the case[, for example,] in a substantially integrated district," then the challenged district map "cannot be responsible for the minority voters' inability to elect its candidates." 478 U.S. at 50. To prove minority political cohesion, therefore, a plaintiff must show that "a significant number of minority group members usually vote for the same candidates." *Id.* at 56; *see also Gomez v. City of Watsonville*, 863 F.2d 1407, 1415 (9th Cir. 1988) (holding that minority voters are "politically cohesive" if they have "expressed clear political preferences that are distinct from those of the majority."). Courts have interpreted "a significant number" to mean that a candidate receives over 50% of the minority vote, with higher percentages evidencing stronger minority cohesion. *See, e.g.*, *Montes v. City of Yakima*, 40 F.

Supp. 3d 1377, 1403 (E.D. Wash. 2014) (finding minority political cohesion where the Latino candidates won more than 50% of the votes cast by Latino voters); *Fabela v. City of Farmers Branch, Tex.*, 2012 WL 3135545, at *11 (N.D. Tex. Aug. 12, 2012) (finding cohesion where statistics showed "overwhelming"—that is, over 67%—support by minority voters for minority candidates in three of five elections analyzed, and noting that 54.1% support, though possibly only showing moderate cohesion, still showed cohesion).

In races involving multiple candidates, which is often the case in California primaries, courts have taken varying approaches when the minority group splits their vote among two or more minority candidates. As discussed below, at least one court in the Ninth Circuit has found that elections where minority candidates together received a large share of the minority vote are evidence of political cohesion, and other courts have found that races where the minority group splits their vote among minority candidates are evidence of a lack of political cohesion.

II. Analysis

As the Supreme Court has made clear, when minority voters fail to show a preference for particular measures or candidates, this is evidence of a lack of cohesion. In races involving more than two candidates, courts in the Fifth and Fourth Circuit have held that these multiple-candidate races may also be evidence of a lack of political cohesion, even when the minority group shows a preference for minority candidates by splitting their votes among those candidates. In *Monroe v. City of Woodville*, for example, the Fifth Circuit differentiated between racial polarization in general and minority voter cohesion in particular, noting that racial polarization "indicates that the group prefers candidates of a particular race" while political cohesion "implies that the group generally unites behind a single political 'platform' of common goals and common means by which to achieve them." 881 F.2d 1327, 1331 (5th Cir. 1989), *opinion corrected on reh'g*, 897 F.2d 763 (5th Cir. 1990). The Fifth Circuit further elaborated that where only one black candidate is running for office, voter cohesion and racial bloc voting may be indistinguishable, and the latter may provide evidence for the former. *Id.* at 1331 n.8. Races involving more than one black candidate, however, are not as straightforward. If "black voters overwhelmingly favor a particular black candidate to the exclusion of others, data on racial bloc voting will be more probative to determining political cohesiveness." *Id.* at 1331. But if black voters split their vote "among several different black candidates for the same office," "they may lack political cohesion." *Id.*

Several courts in the Fourth and Fifth Circuit have followed the reasoning in *Monroe*. *See, e.g., N.A.A.C.P. v. City of Columbia*, 850 F. Supp. 404, 418 (D.S.C. 1993) ("To say that voters who have split their vote among two or more [minority] candidates are 'cohesive' is contrary to political reality."); *Levy v. Lexington Cnty., S.C.*, 589 F.3d 708, 720 (D.S.C. 2009) (remanding case where the district court did not consider *Monroe's* holding that "minority voters may be racially polarized but still lack political cohesion if their votes are split among several different minority candidates for the same office"). In *LULAC v. Clements*, the Fifth Circuit again relied on *Monroe*, noting that: "If, in a certain community, white citizens vote only for candidates of type A, while minority citizens are split in voting for candidates of types X, Y, and Z, then there would be evidence of racially polarized voting—minority and white voters voting

differently—but no evidence of minority political cohesiveness." 986 F.2d 728, 744 (5th Cir. 1993).

The Ninth Circuit has not explicitly weighed in on this question but at least two district courts in the Circuit have touched on the issue. Neither court directly adopted the reasoning in *Monroe*. In *Luna v. Kern County*, for example, the district court found minority cohesion even though Latino voters split their votes among Latino candidates in two of the races analyzed by the plaintiffs' expert. 291 F. Supp. 3d 1088, 1120 (E.D. Cal. 2018). *Luna* involved a Section 2 challenge where plaintiffs alleged that Kern County's 2011 supervisorial district map impermissibly diluted the Latino vote and denied Latinos the opportunity to elect representatives of their choice. *Id*. at 1097. At trial, plaintiffs' statistical expert Dr. Morgan Kousser testified about the presence of racially polarized voting in Kern County. *Id.* at 1098. Dr. Kousser analyzed twenty-two non-partisan elections involving Latino candidates in Kern County over a ten-year period. *Id*. at 1120. After going over a series of elections involving two candidates and finding evidence of Latino voter cohesion, the court noted that "[e]ven in races with more than three candidates, Latino candidates consistently earned a broad share of the Latino vote." *Id.* at 1121. For example, in a 2010 primary race with twelve candidates, two Latino candidates garnered 65 percent of the Latino vote. *Id*. In another 2010 primary election, a seven-person race, the three Latino candidates collectively garnered 85 percent of the Latino vote. *Id.* Because Latino voters consistently voted cohesively for Latino candidates, the *Luna* court found that Latinos in Kern County were politically cohesive. *Id.* at 1127. Thus, the *Luna* court treated multi-candidate races where Latinos split their vote among Latino candidates as evidence that supported a finding of voter cohesion because these races showed that Latino voters consistently rallied around Latino candidates.

Aldasoro v. Kennerson also touches on this question, but in the context of at-large voting systems that allow voters to cast a ballot for each open seat. 922 F. Supp. 339 (S.D. Cal. 1995). This case may therefore not be directly analogous to cases where single-member districts are being challenged. In *Aldasoro*, plaintiffs alleged that the at-large election system of the El Centro Elementary School District Board of Trustees ("El Centro") violated Section 2 by diluting the ability of Latino voters to elect candidates of their choice. *Id*. at 341. The court acknowledge that Latino voters were "generally, though not always, [ ] politically cohesive in support of" Latino candidates, and noted that there was "no dispute" that plaintiffs satisfied the second *Gingles* precondition. *Id*. at 344. There was one race, however, involving more Latino candidates than there were open seats where the court found no evidence of cohesion. The 1991 school board election involved nine candidates who were running for three seats. *Id.* at 350. Three candidates were Caucasian, one was Asian, one was Black, and four were Hispanic. *Id.* Two Caucasian candidates and one Black candidate were elected to the three open seats. *Id.* Three of the four Latino-preferred candidates were Latino and were unsuccessful. *Id.* at 351. According to one of the plaintiffs' expert's analyses, Latino candidates lost because of "a lack of cohesion by Hispanic voters who split their votes among more [Latino] candidates (four) than there were seats up for election (three), and for Newton [the successful Caucasian candidate]." *Id*. The plaintiffs' expert further conceded that if Latinos had not split their vote in the 1991 election, they may have been able to elect one or two of the Latino candidates. *Id.* The court held that this election was "not an example of the third precondition or inability of [Latinos] to elect at-large," but was instead "an example of a lack of cohesion." *Id.*

III. Conclusion

Although courts in the Fourth and Fifth Circuits follow *Monroe* and treat elections where minority voters split their vote among two or more minority candidates as evidence of lack of cohesion, the Ninth Circuit has not adopted a clear rule. Only one case, *Luna*, has directly dealt with this issue in challenges to single-member districts, and that court treated the broad support that Latino candidates received from Latino voters as further evidence of minority voter cohesion. The other case, *Aldasoro*, took an approach similar to *Monroe*, but it is not directly analogous to cases challenging single-member districts. Instead, it involved a challenge to an at-large system, the race in question was held to fill three open seats, and Latino voters split their votes five ways among four Latino candidates and one white candidate.

Applicant Details

First Name	**John**
Last Name	**Beaty**
Citizenship Status	**U. S. Citizen**
Email Address	**john-beaty@uiowa.edu**
Address	**Address** **Street** **1132 East Washington St.** **City** **iowa City** **State/Territory** **Iowa** **Zip** **52245** **Country** **United States**
Contact Phone Number	**612-720-5954**

Applicant Education

BA/BS From	**Carleton College**
Date of BA/BS	**June 2019**
JD/LLB From	**University of Iowa College of Law** **http://www.law.uiowa.edu**
Date of JD/LLB	**May 30, 2023**
Class Rank	**5%**
Law Review/Journal	**Yes**
Journal(s)	**The Iowa Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**VanOosterhout-Baskerville Domestic Competition** **Baskerville Regional Competition Team**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Elias, Stella Burch
stella-elias@uiowa.edu
319-335-9047
Roesler, Shannon
shannon-roesler@uiowa.edu
319-467-4865

This applicant has certified that all data entered in this profile and any application documents are true and correct.

John Beaty
1132 East Washington St. Apt. 1| Iowa City, IA 52245 | 612-720-5954 | John-beaty@uiowa.edu

The Honorable Juan R. Sánchez
14613 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106

Dear Judge Sánchez,

I am writing to apply for a clerkship in your chambers. I am a recent graduate of the University of Iowa College of Law and was ranked 4 in my class. While in law school, I was an Articles Editor for the Iowa Law Review. Immediately after graduation, I will be working as a litigation associate at Dorsey & Whitney in Minneapolis.

Attached please find my resume, transcript, and a writing sample. Letters of recommendation from Stella Elias and Shannon Roesler will be uploaded separately. Please reach out if you have any questions.

Best,

John Beaty

John Beaty
1132 East Washington St. Apt. 1| Iowa City, IA 52245 | 612-720-5954 | John-beaty@uiowa.edu

Education

The University of Iowa College of Law, *Iowa City, Iowa*: *Juris Doctor with Highest Honors* 2023
GPA: 3.97: Class Rank: 4 out of 176
Involvement: Articles Editor, 108 IOWA L. REV.; Student Writer, 107 IOWA L. REV.; Baskerville Regional Moot Court Team; Stephenson Trial Advocacy Competition; London Law Program Study Abroad; Panel on Student Conduct; Appellate Advocacy Volunteer Judge; American Mock Trial Association Volunteer Judge.

Honors: Outstanding Scholastic Achievement Award; Alan I. Widiss Faculty Scholar Award for the most outstanding and distinctive scholarly paper; Dean's Award for Academic Excellence (highest grade) for Contracts, Torts, Administrative Law, Insurance Law, and First Amendment; Jurisprudence Award Academic Excellence (highest grade in a seminar) for Federal Indian Law and Higher Education & the Law; Faculty Award for Academic Excellence (second highest grade) for Constitutional Law I; Top Three Brief in Appellate Advocacy I.

Publications: *Critical Race Theory in the Classroom: Iowa's Critical Race Theory Ban and the Limits of the First Amendment*, 27 J. GENDER RACE & JUST. (forthcoming 2024); *The Impact of the Inflation Reduction Act on Energy Justice and Green Energy Development in Indian Country*, 12 LSU J. ENERGY L. & RES. (forthcoming 2024).

Carleton College, *Northfield, Minnesota*: Graduated Spring 2019
Bachelor of Arts, Sociology and Anthropology Major, History Minor
GPA: 3.5
Involvement: Mock Trial Captain, 88.1 FM KRLX Content Director, Academic Standing Committee, Search Committee for the Vice President for Admissions and Financial Aid, Music Journalist for *No Fidelity*.

Experience

Dorsey & Whitney, *Minneapolis, Minnesota*
Summer Associate, Summer 2022
Assisted attorneys on regulatory, litigation, and transactional matters at an international law firm.

The University of Iowa, *Iowa City, Iowa*
Research Assistant to Professor Diamantis, Fall 2021-Spring 2022
Researched corporate crime, privacy, and philosophy of law issues.

Nebraska Appleseed, *Lincoln, Nebraska*
Economic Justice Law Clerk, Summer 2021
Researched constitutional, election, and administrative law issues. Drafted legal memoranda in support of economic justice focused litigation and policy initiatives. Prepared open records requests to state and federal agencies.

Paschal Nwokocha and Chukwu Law Offices LLC, *Minneapolis, Minnesota*
Immigration Paralegal, Summer 2019-Winter 2020
Supported attorneys on complex immigration cases. Prepared immigration petitions.

Carleton College, *Northfield, Minnesota*
New Student Week Student Coordinator, Summer 2018

Program and Community Assistant, Summer 2016 and Summer 2017
Supported high school students attending Carleton's academic summer programs. Prepared student feedback reports.

Sports Photographer, Fall 2016- Spring 2018

Interests

Classic and international film, jogging around Iowa City, bar trivia, jazz and techno music, and cooking new soups from around the world.

THE UNIVERSITY OF IOWA

Office of the Registrar Official Transcript

Name:	John P. Beaty
University ID:	01420115
Month/Date of Birth:	01/17
Date Generated:	06/12/23 08:58 AM

University of Iowa Degree(s):
Juris Doctor Conferred May 12, 2023
With Highest Distinction

Degree(s) from other institution(s):
BA Carleton College, Northfield, MN 2019

Previous/Transfer institution(s):
Carleton College, Northfield, MN 2015-2019

**********START ACADEMIC RECORD**********

Course Number	Course Title	Sem Hrs	Grade
Fall 2020 / College of Law [1]			
LAW 8032	Legal Analysis Writing and Research I	2.0	3.4
LAW 8037	Property	4.0	4.1
LAW 8017	Contracts	4.0	4.3
LAW 8046	Torts	4.0	4.3
LAW 8026	Introduction to Law and Legal Reasoning	1.0	P

	Graded Hrs Att	GPA	Graded Hrs Earned	Hrs Earned
UI Term:	14.0	4.11	14.0	15.0
UI Cum:	14.0	4.11	14.0	15.0

Spring 2021 / College of Law [1]				
LAW 8460	Evidence	3.0	3.7	
LAW 8033	Legal Analysis Writing and Research II	3.0	3.8	
LAW 8006	Civil Procedure	4.0	4.0	
LAW 8010	Constitutional Law I	3.0	4.0	
LAW 8022	Criminal Law	3.0	4.0	

	Graded Hrs Att	GPA	Graded Hrs Earned	Hrs Earned
UI Term:	16.0	3.91	16.0	16.0
UI Cum:	30.0	4.00	30.0	31.0

Fall 2021 / College of Law				
LAW 8504	Corporate Crimes	3.0	3.9	
LAW 8421	Employment Law	3.0	4.0	
LAW 8105	Administrative Law	3.0	4.1	
LAW 9010	Appellate Advocacy I	1.0	P	
LAW 9060	Trial Advocacy	2.0	P	
LAW 9115	Law Review	1.0	P	

	Graded Hrs Att	GPA	Graded Hrs Earned	Hrs Earned
UI Term:	9.0	4.00	9.0	13.0
UI Cum:	39.0	4.00	39.0	44.0

Spring 2022 / College of Law				
LAW 8415	Employment Discrimination	3.0	3.2	
LAW 8856	Securities Regulation	3.0	3.5	
LAW 8280	Constitutional Law II	3.0	3.8	
LAW 8481	Federal Courts	3.0	4.0	
LAW 9021	Van Oosterhout Baskerville Mt Ct Comp	1.0	P	
LAW 9115	Law Review	1.0	P	

	Graded Hrs Att	GPA	Graded Hrs Earned	Hrs Earned
UI Term:	12.0	3.63	12.0	14.0
UI Cum:	51.0	3.91	51.0	58.0

Fall 2022 / College of Law				
LAW 8791	Professional Responsibility	3.0	3.6	
LAW 8436	Energy Law and Policy	3.0	3.9	
LAW 8584	Insurance Law	3.0	4.1	
LAW 8593	Federal Indian Law	3.0	4.3	
LAW 9037	Advanced Moot Court Competition Team	1.0	P	
LAW 9046	Moot Court Board	1.0	P	
LAW 9061	Adv Trial Advocacy - Stephenson Comp	1.0	P	
LAW 9118	Student Journal Editor-Law Review	1.0	P	

	Graded Hrs Att	GPA	Graded Hrs Earned	Hrs Earned
UI Term:	12.0	3.98	12.0	16.0
UI Cum:	63.0	3.93	63.0	74.0

Spring 2023 / College of Law				
LAW 8433	Environmental Law	3.0	4.0	
LAW 8216	Civil Proc Pre-Trial Theory & Practice	1.0	4.2	
LAW 9490	Independent Research Project	1.0	4.2	
LAW 8278	First Amendment: Free Express & Religion	3.0	4.3	
LAW 9631	Higher Education and the Law	3.0	4.3	
LAW 8123	Advanced Legal Research	2.0	P	
LAW 9046	Moot Court Board	1.0	P	
LAW 9118	Student Journal Editor-Law Review	2.0	P	
LAW 8428	British Legal System	2.0	4.1	

	Graded Hrs Att	GPA	Graded Hrs Earned	Hrs Earned
UI Term:	13.0	4.18	13.0	18.0
UI Cum:	76.0	3.97	76.0	92.0

[1]University operations and instruction continued to adapt to the global public health emergency. Many course offerings and modalities were impacted, which in turn may have affected an individual student's experience in each course.

**********END ACADEMIC RECORD**********

http://registrar.uiowa.edu/legends-and-keys

June 02, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am delighted to recommend John ("JP") Beaty, one of the stars of the University of Iowa College of Law Class of 2024, for a clerkship in your chambers. JP, who has been my student in two very different classes (first year civil procedure and an upper-level comparative law course taught overseas) is an exceptional student in every respect. He is currently ranked seventh in his class, and in my experience as his classroom instructor, his outstanding academic work easily places him in the top two or three students in the law school. JP has a work ethic second to none, and he dedicates all his (considerable) energy and enthusiasm to his schoolwork and his extracurricular activities. He is a thoughtful writer, a thorough researcher, and a collegial and considerate team player. In short, I have no doubt that JP will be a terrific law clerk.

In Spring 2021, JP was one of the 66 students enrolled in my 1L civil procedure course. The course, which met twice per week, involved Socratic instruction, group discussion, and collaborative problem solving in class, as well as individual research projects outside of the classroom. The interactive nature of the course and the small enrollment allows me to analyze the students' work holistically and to develop close relationships with each student, including JP. In a class of talented students, JP stood out from the very first day and throughout the semester he was an absolute pleasure to teach. JP ultimately achieved a grade of 4.0, a solid A, putting him at the very top of the class. JP's intellectual curiosity shone through in each class, as did his gift for grasping and explaining complex legal issues in simple terms. The comments that he made in class were thoughtful and precise, and he was considerate of the views of others. He obviously had good and warm relationships with his classmates and was never overbearing or over-eager in class, while at the same time playing a leading role in solving problems and helping his small group partners reach the correct conclusions during our in-class exercises.

During Winter Term 2022, JP was one of 40 students enrolled in the London Law Program, a winter intersession program with three academic courses, that I direct and teach in Iowa and London. JP enrolled in the British Legal System course, which I teach myself, comparing the law of England and Wales with the law of the United States. His final grade in the class was a 4.1, the highest grade given out in the London Law Program this year. Learning in the London Program goes beyond the classroom. We hold numerous program events, including a variety of field trips, comprising academic visits and social outings, as well as group meals and other events. The program experience inevitably takes many of our students out of their usual "comfort zones," challenging them to live and work overseas, to conduct legal research using foreign law materials, and to adapt to a variety of challenging communal living situations. During the program, JP was always a cheerful and adaptable participant. He demonstrated sterling personal qualities, including, but not limited to resilience, fantastic teamwork and collaboration skills, perseverance, and a good sense of humor. JP also tackled all the program activities with his typical energy and determination—he and his teammates won the program's Bankside scavenger hunt, visiting (and photographing) 36 London Landmarks, and walking for several miles over the course of one long afternoon. Based on my experiences working with JP in London, I can say with confidence that if you are looking for a smart, even-keeled, hard-working, and dependable law clerk, you could not do better than JP Beaty.

In sum, I believe that a judicial clerkship would be a terrific fit for JP, given his academic background, work experience, and sterling personal qualities. I also think that he would be a great resource for you, and a collegial and dependable co-worker for his co-clerks and the judicial assistant(s) in chambers. I therefore strongly recommend that you give JP's application serious consideration. Please feel free to contact me by email (stella-elias@uiowa.edu) or phone (+1-319-335-9047) if you have any additional questions; it would be a pleasure to tell you more about this talented student.

Sincerely,

Stella Burch Elias
Professor and Chancellor William Gardiner
Hammond Fellow in Law
University of Iowa College of Law

June 05, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am writing in support of John Beaty's application for a clerkship in your chambers. I have had the pleasure of having Mr. Beaty in both my Energy Law and Policy class and my Environmental Law class this past academic year.

Mr. Beaty received one of the top grades in both classes (a notable achievement because both are difficult upper-division courses graded on the curve). Because Energy Law was a smaller class of 18 students, I had the opportunity to engage in discussion with Mr. Beaty almost every class session. The material is challenging; students grapple with the complex landscape of electricity regulation at all levels of government. Mr. Beaty showed an aptitude for analyzing the complex regulatory challenges that state public utility commissions, grid operators, and federal regulators face in transitioning to a low-carbon grid. In fact, he often helped his classmates understand the nuances of these challenges. In addition, he sometimes conducted independent research around issues of interest and would share this research with the class or stop by during office hours to discuss it with me. He showed the same depth of understanding in Environmental Law this past spring when analyzing the complex constitutional and interpretive questions presented by cases involving technical federal statutes.

Mr. Beaty has outstanding legal research and writing skills, as well as oral advocacy skills. As his resume demonstrates, he has participated in appellate and trial advocacy competitions (and done very well) while serving as a member of the Iowa Law Review and, this past year, as Articles Editor for the journal. Many second-year students who are invited to participate in an advocacy competition and to join a journal, choose to do one. It is rare to commit to both endeavors and graduate with such an exceptional G.P.A. In addition, both academic papers listed on his resume have received recognition. He is publishing his law review note in Iowa Law's Journal of Gender, Race, and Justice. His seminar paper on the Inflation Reduction Act's impact in Indian Country received the highest grade in the class and was recently accepted for publication in the LSU Journal of Energy Law and Resources.

Because of his interest in environmental and energy law, I have had several opportunities to visit with him outside of class, and I have very much enjoyed these conversations. Mr. Beaty always raises thoughtful questions and has a remarkable ability to analyze an issue from various perspectives and to identify the range of solutions to a problem. I have also been impressed by his professionalism, maturity, and communication skills.

In short, Mr. Beaty will make an exceptional law clerk. It is my pleasure to give him my highest recommendation. If you have questions about him, I hope that you will reach out to me. I would be delighted to discuss his qualifications and share further details about my experience working with him.

Sincerely,

Shannon M. Roesler
Charlotte and Frederick Hubbell Professor of Environmental and Natural Resources Law
University of Iowa College of Law

John Beaty
1132 East Washington St. Apt. 1| Iowa City, IA 52245 | 612-720-5954 | John-beaty@uiowa.edu

Attached is the statement of the case and analysis section for a brief I prepared for competition in the McGee Civil Rights Moot Court Competition. The brief argues a federal constitutional issue before a fictional state supreme court. For brevity, I have omitted the table of contents, table of authorities, and question presented.

In compliance with competition rules, the brief is my original research and writing and has not been edited by any other person.

STATEMENT OF CASE

Respondent, H.G., is a politically active citizen of McGee. R. at 2. H.G. is involved in activism calling for reforms to the McGee police department. Id. H.G.'s activism involves attending protests at city hall and the police department. Id. H.G. operates two social media accounts where she frequently livestreams protest activity. Id. Over 1000 people follow H.G.'s social media accounts and view her livestreams. Id.

On April 22, 2022, McGee's Department of Human Services ("DHS") received a child-protection report of three allegations of neglect against H.G.. Id. at 2. DHS visited H.G.'s home in accordance with a state law that requires DHS to make home visits after receiving allegations of neglect. Id. at 3; see McGee Stat. § 943.40, subd. 1. H.G. answered the door but refused to let DHS into the home. R. at 3. H.G. livestreamed her encounter with DHS on her social media. Id.

DHS filed a Petition to Compel in McGee County Court seeking entry into H.G.'s home. Id. In DHS's motion, they requested an order from the district court barring H.G. from livestreaming the search. Id. at 4. The district court held a hearing on the livestreaming issue. Id. An officer from the McGee police testified in support of the motion stating that such an order was necessary to keep the DHS employees safe from a a "coordinated attack" from third parties using location information gleaned from the livestream. Id. DHS did not introduce any evidence indicating that such an attack had happened in the past or that such an attack was likely to happen because of H.G.'s livestream. Id. at 5. H.G. testified at the hearing that she wanted to livestream the search to protest Respondents conduct throughout the process and to prevent child-protection agents from violating her rights. Id.

The district court granted the motion to compel and enjoined H.G. from "broadcasting a live stream to any social media website from inside the home during the time when child protection

workers are at or inside the home." Id. at 6. However, the district court's order did allow H.G. to "record the visit and post the recording to social media . . . after the home visit has concluded." Id.

H.G. appealed, arguing that the district court's order violated her First Amendment speech rights. Id. The McGee Court of Appeals reversed. Id. at 13. The Court held that livestreaming child-protection workers was protected first amendment speech, that the trial court's prohibition was content based, and that the order did not survive strict scrutiny. Id. at 11–13. DHS appealed and this Court granted further review.

ARGUMENT

I. THE COURT OF APPEALS SHOULD BE AFFIRMED BECAUSE H.G.'S LIVESTREAMING IS PROTECTED SPEECH, THE DISTRICT COURT'S ORDER IS CONTENT BASED, AND THE RESTRICTION OF SPEECH IS NOT NARROWLY TAILORED TO A COMPELLING GOVERNMENT INTEREST

The Court of Appeals correctly held that H.G.'s proposed livestreaming was protected by the First Amendment because her livestreaming was protected speech as dissemination of information and expressive conduct. The Court of Appeals also correctly determined that the District Court regulated H.G.'s speech based on its content and applied strict scrutiny. Finally, applying strict scrutiny, the Court of Appeals correctly held that the District Court's order was not narrowly tailored to the compelling government interest of DHS officer safety.

In First Amendment cases findings of fact are reviewed for clear error and questions of law the ultimate determination of whether a restriction violates the right to free speech is reviewed do novo. Thompson v. Hebdon, 7 F.4th 811, 818–19 (9th Cir. 2021).

A. Livestreaming Government Officials Performing Their Duties is Protected First Amendment Speech

H.G.'s proposed livestreaming is protected First Amendment speech. The First Amendment provides "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. The First Amendment is incorporated to the states, meaning that state courts and executive officials cannot abridge the freedom of speech. Gitlow v. New York, 268 U.S. 652, 666–67 (1925). The

dissemination of information through audio and video material is protected speech. Sorrell v. IMS Health Inc., 564 U.S. 552, 570 (2011) (holding the dissemination of information is a form of protected speech); Sharpe v. Winterville Police Dep't, 59 F.4th 674, 680–81 (4th Cir. 2023) (holding that livestreaming police during a traffic stop was protected speech under a dissemination of information theory). The First Amendment also protects expressive conduct, where actions are used to communicate ideas. Texas v. Johnson, 491 U.S. 397, 406 (1989) (holding that burning the American flag was protected speech when used to express political ideas). H.G.'s livestreaming of child protection workers is protected speech. Her livestream is protected because it was a means of disseminating information about the conduct of public officials. In the alternative, this Court can hold that H.G.'s act of livestreaming is protected because it is expressive conduct.

1. H.G.'s livestream is protected speech because it the dissemination of information about a matter of public concern.

H.G.'s livestreaming of child-protection workers is protected speech because it disseminates information to the public. The Supreme Court has made it clear that "the creation and dissemination of information are speech within the meaning of the First Amendment." Sorrell v. IMS Health Inc., 564 U.S. 552, 570 (2011). For example, in Sorrell, The Court held that collecting and disseminating information about prescription writing habits of doctors was protected speech under the First Amendment because disclosure of "[f]acts . . . are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs." Id. at 570. See also Sharpe, 59 F.4th at 680–81 (holding livestreaming police was protected dissemination of information).[1]

[1] The circuit courts generally agree that filming public officials is protected dissemination of information. Irizarry v. Yehia, 38 F.4th 1282, 1289 (10th Cir. 2022) (concluding that "filming the police performing their duties in public is protected activity" under a dissemination of information theory); Fordyce v. City of Seattle, 55 F.3d 436, 439 (9th Cir. 1995) (same); Smith v. City of Cumming, 212 F.3d 1332, 1133 (11th Cir. 2000) (same); Glick v. Cunniffe, 655 F.3d 78 (1st Cir. 2011) (same); American Civil Liberties Union v. Alvarez, 679 F.3d 583, 595–98 (7th Cir. 2012) (same).

Here, H.G.'s livestreaming of child protection workers was a method of disseminating information to the public. H.G. broadcasts to an online audience of over one thousand politically engaged members of the public. Previously, H.G. used this platform to broadcast the conduct of police officers during public protests. The proposed livestream of DHS officials searching her home fit within this pattern of news gathering and dissemination. Footage of the manner child-protection officials performs their investigative functions allows the public to act as a "watchdog of government activity." Leathers v. Medlock, 499 U.S. 439, 447 (1991). The conduct of child-protection workers is a matter of public concern because activists, journalists, and scholars currently debate the efficacy of the current system and possible reforms. See e.g Eli Hager, In Child Welfare Cases, Most of Your Constitutional Rights Don't Apply, ProPublica (Dec. 29, 3022), https://www.propublica.org/article/some-constitutional-rights-dont-apply-in-child-welfare (arguing the child welfare system fails to meet the standards of due process). H.G.'s livestream would provide "facts" that could form "the beginning point for . . . speech that is most essential . . . to conduct human affairs" around a matter of public concern and under Sorell is protected dissemination of information. 564 U.S. at 570.

The Fourth Circuit persuasively discribes why livestreaming public officials was protected dissemination of information in Sharpe. There, the plaintiff attempted to livestream the encounter with police on Facebook live but was stopped by the officer. Sharpe, 59 F.4th at 678. The Fourth Circuit held that the plaintiff's livestreaming was protected speech because "[r]recording police encounters creates information that contributes to discussion about governmental affairs." Id. at 681. Like the plaintiff in Sharpe, H.G. intended to record a public official in the performance of their duties. Like the footage in Sharpe that may shed light on the practices of police officers, the footage of the DHS officers would contribute to the public discourse on protections for parents in

the child protection arena. The analysis in Sharpe is a template for recognizing H.G.'s right to livestream public officials in the course of their duties.

2. H.G.'s livestream is protected speech because it was conduct meant to communicate an idea to an audience.

In the alternative, this court can conclude that H.G.'s livestream is protected expressive conduct. The Supreme Court held that "conduct may be 'sufficiently imbued with elements of communications to fall with the scope of the First . . . Amendment" when (1) there is "an intent to convey a particularized message" and (2) "the likelihood was great that the message would be understood by those who viewed it." Johnson, 491 U.S. at 404 quoting Spence v. Washington, 418 U.S. 405, 409–11 (1974). For example, in Johnson, the Court held that the act of burning the American flag in front of Dallas City Hall during the Republican National Convention was protected expressive conduct. Id. at 400–402. The Court concluded that the Johnson intended to express political disagreement with the Regan administration and that the message would be understood given the "overwhelmingly political" context for the act. Id. at 406. Here, H.G.'s act of livestreaming meets both requirements.

First, H.G. intended to "convey a particularized message." Id. at 404. At the hearing, H.G. testified that that her goal in livestreaming was to express her dissatisfaction with the process she received from DHS and to communicate to the DHS employees that they should not violate her rights. Like the flag burning protester in Johnson, H.G.'s act was intended express a specific political message about the child welfare system. 491 U.S. at 406.

Second, her message "would be understood by those who viewed it." Id. at 404. H.G.'s political message would be understood by the viewers of her livestream because, H.G. frequently livestreams the conduct of government officials as an act of protests. The act of livestreaming also has independent political significance that would be understood by DHS officials and the public at large. In connection with the Black Lives Matter movement, the act of livestreaming has been used

as a tool of protest. Lexi Pandell, How Livestreaming is Transforming Activism Around the World, Wired (Nov. 16, 2016), https://www.wired.com/2016/11/livestreaming-transforming-activism. Livestreaming has been used as a tool to "change the dynamic" in interactions between police and activists in a way that helps protect the rights of protesters. Id. Filming a government official during the performance of their duties is broadly understood to send a message that the world is watching their conduct. Like the flag burning at a protest, the "overwhelmingly political" context for H.G.'s proposed livestream, means that the message of her livestream would be understood by both her audience on social media and the DHS officials performing the search. Johnson, 491 U.S. at 406.

H.G.'s choice to livestream was intended to convey a message about her views on the search and that message would be likely to be understood by both the viewing audience on social media and by the DHS officials performing the search. Therefore, under Johnson, this court can find that H.G.'s proposed livestreaming falls within the protections of the First Amendment.

* * *

The Court of Appeals correctly held H.G.'s proposed livestreaming activities were protected under the first amendment as dissemination of information or as expressive conduct. This Court can affirm on either ground.

B. The Trial Court's Order Was Content Based Regulation of Speech and Must Survive Strict Scrutiny.

The Court of Appeals correctly determined that the order barring livestreaming was content based and subject to strict scrutiny. Laws that are "[c]ontent based . . . those that target speech because of its communicative content – are presumptively unconstitutional" and subject to strict scrutiny. Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015). On the other hand, if a law is content neutral and merely regulates the "time, place, or manner" of speech, it only needs to survive intermediate scrutiny. City of Austin, Texas v. Regan Nat'l Advert. of Austin, LLC, 142 S.Ct. 1464, 1473, 1475 (2022). A restriction is content based if it is "targeted at specific subject matter." Id. at

169. A restriction can also be content based if it is based on the "identity of speaker" because such a restriction is "all too often simply a means to control content." Citizens United v. FEC, 558 U.S. 310, 340 (2010). Here, the restriction on H.G.'s speech is content based and subject to strict scrutiny because it turns on the content of the livestream and the identity of the speaker.

1. The trial court's order was content based regulation because its applicability turned on the contents and subject matter of H.G.'s livestream.

The trial court's order was content based because its application turned on the content of H.G.'s livestream. If a government entity regulates "speech because of the topic discussed or the idea or message expressed" it is content based. Reed, 576 U.S. at 163. For example, in Reed, the Court held that a sign code that differentiated between commercial signs, religions signs, and political signs was content based. Id. at 164. See also Carey v. Brown, 447 U.S. 455, 461 (1980) (holding that a code that differentiated between political and labor protesting was content based). Here, the trial court's order was not targeted at livestreaming in general, but rather the livestreaming of specific subject matter. The order bars H.G. from livestreaming the inside of her home during the time that DHS agents searched the home. In contrast, H.G. could livestream other subject matter, such as her trip to the grocery store or birdwatching in the park during the search and comply with the terms of the order. The order is content based on its face because it prevents H.G. from livestreaming certain disfavored subject matter, while leaving her free to livestream other subjects. Reed, 576 U.S. at 163; Carey 447 U.S. at 461.

This is not a time, place and manner restriction because the government's interest is justified by reference to the content of the livestream. A restriction on speech is not a content neutral time, place, and manner restriction if the restriction cannot be "justified without reference to the content of the regulated speech." Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) quoting Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984). In Ward, the Court held that a city's requirement that performers in a public bandshell use the city's sound equipment and

professional sound equipment was content neutral. Ward, 491 U.S. at 787, 792. The Court reasoned that the city's interest in sound quality and keeping noise at a reasonable level, applied no matter what type of music or message was being expressed by the performer. Id. at 792. Here, in contrast, the government interest depends entirely on the content of the broadcast. Unlike the sound quality restrictions in Ward that applied equally across messages, the government does not argue that the non-speech elements of livestreaming impede important government interests. They do not argue, for example, that H.G. would block the path of DHS workers while trying to livestream and physically obstruct the search.[2] Instead, at the trial court, DHS officials argued third parties could use the content of the livestream to determine the location of DHS officials in the home and plan a coordinated attack. For third parties to locate DHS officials in the home, they would need to view the broadcast. Therefore, the government's asserted safety interest rises and falls on what H.G. chose to film, the content of the broadcast. Had H.G. chosen to broadcast something else like her face, her child, or a single corner of the room the possibility of a coordinated attack would vanish into thin air. Because the trial court's ban on livestreaming cannot be "justified without reference to the content of the regulated speech" the Court of Appeals correctly decided it was content based. Ward, 491 U.S. at 791.

2. The trial court's order was content based regulation because its applicability turned on the contents and subject matter of H.G.'s livestream.

Additionally, the trial court's order is content based because it singles out a specific speaker for regulation. When a law bans certain categories of speech based on who is speaking, the law is content based. Sorrell, 464 U.S. at 564–65. For example, in Sorrell, the Court invalidated a Vermont statute that prevented pharmaceutical manufacturers from dispersing information of doctor's

[2] The trial court's order belies the fact that the government's safety interest did not depend on the H.G.'s conduct while livestreaming, but rather the content of her broadcast. The trial court allowed H.G. to film DHS officials during the search and upload after the fact. The physical act of filming an official and livestreaming the official are materially identical. The fact that the trial court allowed videotaping but not livestreaming cannot be justified without reference to the content of the broadcast.

prescribing habits because it restricted specified speakers from disseminating specified information. Id. See also Turner Broadcasting, 512 U.S. at 568 ("[L]aws favoring some speakers over others demand strict scrutiny when the . . . speaker preference reflects a content preference."). Here, the trial court's order was not a blanket ban on livestreaming the search. Instead, the prohibition only applied to H.G.. Anyone else in the home could have livestreamed the search including H.G.'s child, a family member, or a random passerby. The order prevented an identifiable person from speaking on a specific subject, which indicates that the order was content based rather than content neutral.

* * *

The trial court's order regulated the content of H.G.'s broadcast, was justified by concerns about the content of H.G.'s broadcast and prevented only H.G. from speaking. Any of those grounds are sufficient to affirm the Court of Appeals' determination that the order was a content-based restriction of speech.

C. The Trial Court's Order Cannot Survive Strict Scrutiny Because It Is Not Narrowly Tailored and Fails to Use the Least Restrictive Means to Achieve Its Compelling Interest in The Safety of Child-Protection Workers.

The Court of Appeals correctly concluded that the trial court order could not survive strict scrutiny. A content-based restriction on speech is "presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." Reed, 576 U.S. at 163. H.G. agrees with Respondent that the safety of government officials is a compelling state interest. However, even with the compelling state interest, Respondent fails narrow tailoring. Strict scrutiny is a demanding standard where "if a less restrictive alternative would serve the Government's purpose the [Government] must use that alternative." United States v. Playboy Entertainment Grp., 529 U.S. 803, 813 (2000). Respondent can fail narrow tailoring if the restriction is overinclusive, sweeping in too much speech to accomplish its goal, or underinclusive, doing too little to accomplish its goal. Williams-Yulee v. Florida Bar, 575 U.S. 433, 448–49 (2015);

Simon & Schuster, Inc. v. Member of New York State Crime Victims Bd., 502 U.S. 105, 121 (1991). Here, the trial court's order fails narrow tailoring because it is based on conjecture, underinclusive, overinclusive, and a disfavored prior restraint on speech.

1. The trial court's order is based on conjecture rather than evidence

The trial court's order fails narrow tailoring because DHS did not introduce any particularized evidence that barring H.G. from livestreaming would further officer safety. For the trial court's order to survive narrow tailoring DHS must introduce more than "'mere conjecture' . . . to carry their burden." Sharpe, 59 F.4th at 681 quoting Nixon v. Shrink Missouri Gov't PAC, 528 U.S. 377 (2000). In Sharpe, police officers stopped the plaintiff from livestreaming a traffic stop on social media. Sharpe, 59 F.4th at 678. The police attempted to argue the livestreaming policy was narrowly tailored to the goal of officer safety, because third parties could use the livestream to locate and attack the officers, relying on generalized accounts of. Id. The Fourth Circuit held that generalized speculation about safety threats was not enough to show tailoring. Id. Here, DHS offered nothing more than conjecture about the safety impact of allowing livestreaming. They only pointed to a general concern in safety, did not show that such an attack had ever happened, or that H.G. presented any kind of safety risk. This kind of conjecture is not sufficient to justify strict restrictions on H.G.'s speech rights.

2. The trial court's order is not narrowly tailored because it is underinclusive.

The order barring live streaming is underinclusive because it allows for other actions that would threaten worker safety. A government action is underinclusive if it fails "to restrict other speech equally damaging" to the government's legitimate interest. Williams-Yulee, 575 U.S. at 448. An underinclusive action can "raise 'doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker of viewpoint." Id. quoting Brown v. Entertainment Merchants Ass'n, 564 U.S. 786, 802 (2015). Here, there are other forms of speech that could be equally as dangerous for the child protection workers as livestreaming. For example,

H.G. could share her location with or make a phone call to dangerous third parties, disseminate a blueprint of her property, or call out from the front door to have supports storm the apartment. Failure to address the other means by which H.G. could order a "coordinated attack" suggests that the order may be motivated by a desire to restrict speech, rather than a genuine safety concern.

3. The trial court's order is not narrowly tailored because it is overinclusive.

The order barring livestream is equally overinclusive because it restricts more speech than is needed to fulfill the government interest. An overinclusive action is one that restricts more speech than necessary to accomplish its goal. Simon & Schuster, Inc., 502 U.S. at 121. For example, in Simon & Schuster, the Court struck down a New York law that barred people who were convicted of crimes from receiving book royalties, on the grounds that it would sweep in large amounts of speech including the works of Sir. Walter Raleigh that are unrelated to New York's interest in compensating the victims of crime. Id. at 121–23. Here, the trial court's order sweeps in an inordinate amount of speech to achieve its interest for two reasons.

First, the trial court could have accomplished its goal without restricting any speech. The government's failure to use nonspeech alternatives indicates that a regulation is not narrowly tailored. Thompson v. Western States Med. Ctr., 535 U.S. 357, 371–72 (2002). The Court could have allowed police officers to accompany the child protection workers into the home or ordered that the doors of the apartment remain locked during the search. The failure to consider nonspeech alternatives alone means the trial court did not use the least restrictive means.

Second, even if barring livestreaming was necessary to protect the child protection workers, the order as written was overinclusive. The danger identified at the trial court is that third parties would use the contents of the stream to plan an attack. A livestream that filmed H.G.'s face for the length of the broadcast would not give theoretical third parties the information needed to plan an attack and yet would still be barred by the trial courts order. Likewise, a broadcast that focused on a

corner of a single room would not present the same danger concerns but would be barred by the order. The trial court's order sweeps in speech well beyond what is needed to accomplish the government's goals.

4. The trial court's order is not narrowly tailored because it operates as a prior restraint on speech.

The trial court's order is not the least restrictive means because it is a prior restraint on publication. If an action imposes a "prior restraint[]" on the publication of information has a "heavy presumption against its constitutional validity." Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963). Here, the trial court order operated as a prior restraint, preventing the H.G. from distributing information on a matter of public concern. Rather than wait to see if actual danger emerged and allow trained public officials from responding to the situation in the moment, the trial court barred H.G. from speaking in the future. A prior restraint on speech is strongly disfavored because of its threat to the free dissemination of information and is only appropriate under extreme circumstances. Southeastern Promotions, LTD v. Conrad, 420 U.S. 546, 558–59 (1975). The trial court's order was not the least restrictive means because prior restraints are strongly disfavored.

The trial court's compromise of allowing H.G. to publish the video after the search, does not make its order any less of a prior restraint. As recognized by the Supreme Court even actions that "do[] not prohibit but only postpone[] publication" are still problematic because "[d]elays imposed by governmental authority are a different matter" than self-imposed delays. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 560 (1976). Here a delay of H.G.'s dissemination could prevent her from ever speaking. For example, in many cases of police brutality, a live recording is the only reason there is a public record of the incident. *See* Caitlin Dewey & Abby Ohliheiser, How Live-Streaming has Forever Changed the Way We View Violence, Wash. Post (July 8, 2016), https://www.washingtonpost.com/news/the-intersect/wp/2016/07/08/how-live-streaming-has-forever-changed-the-way-we-view-violence. If the search of H.G.'s home resulted in her death,

injury, or arrest the livestream may be the only chance to publish the search to the world. Barring livestreaming while allowing for after the fact publication is not the least restrictive means of meeting the government's interest.

* * *

The trial court's order was speculative, overinclusive, underinclusive, and a prior restraint on speech. All the deficiencies show the trial court did not use the least speech restrictive means to achieve its compelling government interest. The Court of Appeals correctly held that the order failed strict scrutiny on tailoring and should be affirmed.

D. Even if the Trial Court's Order was Content Neutral, it Cannot Survive Intermediate Scrutiny Because It Fails Narrow Tailoring.

Even if this Court concludes that the trial court's order was a content neutral it can still affirm the Court of Appeals on the ground the trial court's order fails intermediate scrutiny because it is not "narrowly tailored to serve a significant government interest." City of Austin, 142 S.Ct. at 1475. The order cannot satisfy narrow tailoring because it is overinclusive, underinclusive, and a disfavored prior restraint, for reasons discussed supra, in Section I.C.

CONCLUSION

This Court should affirm the Court of Appeals' holdings that livestreaming is protected speech, the trial court's order was content based, and that the order failed strict scrutiny.

Applicant Details

First Name	**Julia**
Middle Initial	**M**
Last Name	**Beckett**
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Contact Phone Number	**2015661959**

Applicant Education

BA/BS From	**Lafayette College**
Date of BA/BS	**May 2021**
JD/LLB From	**Fordham University School of Law** **https://www.fordham.edu/info/29081/center_for_judicial_engagement_and_clerkships**
Date of JD/LLB	**May 20, 2024**
Class Rank	**25%**
Law Review/ Journal	**Yes**
Journal(s)	**Fordham International Law Journal** **Fordham International Law Journal**
Moot Court Experience	**Yes**
Moot Court Name(s)	

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

The Honorable Juan R. Sanchez
United States District Court
for the Eastern District of Pennsylvania
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, Pennsylvania 19106-1729

Dear Chief Judge Sanchez,

I am a rising third-year student at Fordham University School of Law, where I am the Executive Notes & Articles Editor of the *Fordham International Law Journal*, Irving R. Kaufman Memorial Securities Law Moot Court Competition Editor, and a competitor for the Brendan Moore Trial Advocates. I am respectfully applying for a clerkship with your chambers for the 2024–2025 term or any term thereafter.

As an aspiring litigator, the opportunity to serve as a judicial law clerk is of particular interest because it would enable me to best serve my future clients. During the summer after my first year of law school, I was privileged to intern for Magistrate Judge Katharine Parker in the Southern District of New York. As her intern, I had the opportunity to write a draft opinion for a habeas case, for which I researched the Second Circuit's Confrontation Clause jurisprudence. This experience further instilled in me a desire to pursue a clerkship.

On the academic side, I am excited to mentor other students and hone my editorial skills as the Executive Notes & Articles Editor of the *Fordham International Law Journal*, and to serve as the Editor of the Moot Court Board's Kaufman Competition. As Kaufman Editor, I will have the opportunity to employ the research and writing skills that I developed as a member of the Jessup Competition bench team to identify a salient issue in securities law and draft an "opinion" to serve as the basis of the Competition's problem.

It would be an honor to clerk in your chambers. Attached please find my resume, unofficial transcript, and writing sample. Under separate cover are letters of recommendation from: Professor Bennett Capers, who taught my Criminal Law class, and Adjunct Professor Gerrald Ellis, who taught my Affordable Housing class. Thank you for your kind consideration of my application.

Respectfully,

Julia McSpirit Beckett

Julia McSpirit Beckett

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EDUCATION

Fordham University School of Law, New York, NY

J.D. Candidate, May 2024 G.P.A.: 3.516 (G.P.A. of 3.51 = approximate top 25%)

Honors: Ruth Whitehead Whaley Scholar (as of May 2023), *Fordham International Law Journal* (Executive Notes and Articles Editor, Vol. 47), Fordham Law Moot Court Board (2024 Irving R. Kaufman Memorial Securities Law Moot Court Competition Editor; 2023 Philip C. Jessup International Law Moot Court Competition Bench Team), Brendan Moore Trial Advocacy Team (2023 Trials and Tribulations Competition Semifinalist)

Activities: Housing Advocacy Project (Treasurer), Fordham Law Softball

Lafayette College, Easton, PA

B.A., *magna cum laude*, History and German, May 2021 G.P.A.: 3.78

Honors: Phi Beta Kappa, History Honors Thesis and Departmental Honors, Delta Phi Alpha National German Honor Society, Phi Alpha Theta National History Honor Society, Colonel Wilson B. Powell '32 Award for Best History Seminar Paper, Rexroth Prize in German - Outstanding Senior Award, Order of Omega Fraternity and Sorority Honor Society (President), McKelvy Scholar, Marquis Scholar

Thesis: *Writing for Neutrality: German- and Irish-American Experiences of the First World War as Expressed in the German-Language and Irish-American Press*

Activities: Pre-Orientation Service Program (Participant 2017, Staff 2020), Lafayette College Crew Team (Vice President), Alpha Gamma Delta (Vice President of Finance), Resident Advisor for McKelvy House, German Department Conversation Partner, German Club (*President*)

Study Abroad: Language Immersion Program in Bonn, Germany (May – July 2019)

EXPERIENCE

Shearman & Sterling, New York, NY May – July 2023

Summer Associate - Rotating between Litigation and Project Development & Finance practice groups.

Queens District Attorney's Office, Conviction Integrity Unit, Kew Gardens, NY January – May 2023

Legal Extern - Evaluated credible claims of actual innocence from convicted people by reviewing trial transcripts, examining evidence, and writing memoranda on findings and next investigatory steps.

Hon. Katharine Parker, S.D.N.Y., New York, NY May – July 2022

Judicial Intern - Conducted research on the Second Circuit's Confrontation Clause jurisprudence and wrote a draft opinion for a habeas corpus case. Observed arraignments, detention hearings, plea bargains, pre-trial meetings, settlement conferences, and trials.

Lafayette College German Department, Easton, PA August 2020 – May 2021

EXCEL Scholar - Transcribed and translated German-language artists' books from Eastern Bloc countries for an article co-written by Professor Anna Horakova, scheduled to be published in the *Getty Research Journal* in Summer 2023.

Justice Robert Johnson, **New York State Supreme Court**, Bronx, NY January 2019

Judicial Extern - Observed Justice Johnson's guardianship cases and learned about the court's role in determining whether a guardian should be appointed.

LANGUAGES German (conversational)

INTERESTS Distance running (half marathons, training for NYC Marathon), history, baseball

Julia McSpirit Beckett
Fordham University School of Law
Cumulative G.P.A.: 3.516

Fall 2021

Course Name	**Instructor**	**Grade**	**Units**	**Comments**
Criminal Law	Bennett Capers	A	3	
Civil Procedure	Howard Erichson	A-	4	
Legal Writing/Research	Sarah Sacks	IP	2	
Legal Process and Quantitative Methods	Various	P	1	
Property	Paula Franzese	B	5	

Fall 2021 G.P.A.: 3.611

Spring 2022

Course Name	**Instructor**	**Grade**	**Units**	**Comments**
Contracts	Helen Bender	B+	4	
Constitutional Law	Abner Greene	B+	4	
Legislation & Regulation	Jed Shugerman	B	4	
Legal Writing	Sarah Sacks	B	3	
Torts	Benjamin Zipursky	A-	4	

Spring 2022 G.P.A.: 3.281

Julia McSpirit Beckett
Fordham University School of Law
Cumulative G.P.A.: 3.516

Fall 2022

Course Name	Instructor	Grade	Units	Comments
Criminal Procedure: Investigative	Ethan Greenberg	A-	3	
Complex Litigation	Howard Erichson	B+	3	
Trusts and Wills	Lisa Barbieri	A-	4	
Affordable Housing	Gerrald Ellis	A	2	

Fall 2022 G.P.A.: 3.639

Spring 2023

Course Name	Instructor	Grade	Units	Comments
Evidence	Daniel Capra	A	4	
Externship Fieldwork	NA	P	3	Externship placement at the Queens District Attorney's Office Conviction Integrity Unit
Externship: QDA CIU Seminar	Bryce Benjet	B+	1	
Asian Americans and the Law	Hon. Denny Chin and Thomas Lee	B+	2	
Professional Responsibility: Alternative Dispute Resolution Ethics	John Feerick and Kathleen Scanlon	A-	3	

Spring 2023 G.P.A.: 3.700

Julia McSpirit Beckett
Fordham University School of Law
Cumulative G.P.A.: 3.516

Fall 2023

Course Name	**Instructor**	**Grade**	**Units**	**Comments**
Criminal Defense Clinic Seminar	Cheryl Bader		2	
Criminal Defense Clinic Casework	Cheryl Bader and Kaela Economos		3	
Fundamental Lawyering Skills	Frank Handelman		3	
How Judges Decide	Joel Cohen and Richard Emery		2	
Federal Courts	Andrew Kent		4	

Fordham University School of Law
150 West 62nd Street
New York, NY 10023

June 12, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am writing in strong support of Julia McSpirit Beckett's application for a clerkship in your chambers. Ms. Beckett was a student of mine this past semester (Fall 2022) at Fordham Law School in a class called Affordable Housing: Law, Practice, and Policy. She was a standout student in every way, and I am fully confident that she will make an excellent law clerk and an outstanding attorney.

My class is a seminar with around 15 students; grades are based primarily on student participation in class discussions and also on a 15-page research paper. Ms. Beckett excelled in both tasks. She regularly came to class fully prepared and often spoke up, offering insightful comments and questions. Her final paper was superb.

To be honest, my class touches on a somewhat bewildering variety of topics--from affordable housing finance to zoning to tax exemptions to cooperatives--and many students have expressed that it can be overwhelming at times, particularly early in the semester. But not so for Ms. Beckett. She was always prepared and quick on the uptake, and it was clear to me from early in the semester that she was very much dialed in. Her quick analysis was thoughtful and precise. Her questions were clear and to the point. Ms. Beckett's final paper, a comparison of American and German zoning and land use, confirmed what her class participation had already evidenced, that she was a student with exceptional insight and analytic skill.

I have had the opportunity to teach about 50 students now, and Ms. Beckett easily ranks amongst the top few. She is extremely intelligent, diligent, and engaging. And on top of it all, she was just a pleasure to be around.

In short, I recommend Ms. Beckett to you enthusiastically and without reservation. I have no doubt that she would bring outstanding written, oral, and analytic skills, a sound work ethic, and a wonderful personality to your chamber. If I can be of any further assistance in your review of her application, please feel free to contact me at your convenience.

Sincerely yours,

Gerrald Ellis
Adjunct Professor of Law
Fordham University, School of Law

Fordham University School of Law
150 West 62nd Street
New York, NY 10023

June 12, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I'm delighted to write this letter of recommendation on behalf of Julia Beckett in connection with her clerkship application.

Ms. Beckett was one of approximately 80 students in a Criminal Law class I taught at Fordham in Fall 2021. She was quiet in class, but what matters to me is that she earned an "A," and in fact the fourth highest grade in the class. For me, that is impressive, and a large part of my recommendation is based on that.

My recommendation is based on other things as well. Ms. Beckett asked to meet with me to make the argument for why she wanted to clerk, and why she would be a good clerk. She easily won me over with her professionalism, commitment, and personability. My confidence in her ability to excel was only strengthened by her writing sample, an appellate brief on personal jurisdiction. It is smart, well-researched, and well-written.

Ms. Beckett has much more to recommend her. She is the Executive Notes and Articles Editor of the Fordham International Law Journal; was Phi Beta Kappa at her undergraduate institution; and already has impressive judicial internship experience, having served as an intern for the Honorable Katherine Parker, U.S. District Court, Southern District of New York, as well as for Justice Robert Johnson of the New York State Supreme Court, Bronx, NY.

Having clerked myself, I am persuaded Ms. Beckett has the qualities to make a terrific clerk. In short, I'm delighted to support her clerkship application.

Sincerely,

I. Bennett Capers

Bennett Capers - capers@fordham.edu

WRITING SAMPLE

The following writing sample is an excerpt from the brief that I submitted for the 2022 Wormser Competition, in which Fordham students compete intra-school to become members of the Fordham Law Moot Court Board. Students compete in teams of two with each student responsible for one of two issues. The full brief addressed two issues: (1) whether a district court may exercise specific jurisdiction over a defendant with respect to the claims of a nonresident plaintiffs brought under the Fair Labor Standards Act; and (2) whether language agreeing to abide by American Arbitration Association rules and procedures in an arbitration clause demonstrates the "clear and unmistakable" intent of the parties that the question of arbitrability is to be resolved by an arbitrator. This excerpt consists of the statement of facts, which I drafted, as well as the argument for my issue. Though my partner and I competed as a team, the editing that we did on each other's sections was limited to proofreading and checking that the two halves were cohesive. Additionally, we did not receive any feedback on the brief from the Moot Court Board upon completion of the competition.

FACTS

Edison Motors is a private automobile manufacturing company and is incorporated and headquartered in the State of Wormser, with its principal place of business there as well. R. at 3. Edison began its vehicle production at its Iron Mountain plant in Fordham and has since grown to wholly own or contract with manufacturing and design facilities across thirteen states. R. at 3.

As the company grew, it faced difficulty in filling certain specialized job positions. R. at 4. This difficulty only increased with the global pandemic that hit in 2020. R. at 4. In June of that year, Edison contracted with a number of third-party staffing companies, including Alpine Staffing ("Alpine"), to hire independent contractors, known as "fill the gap" workers or "gap workers," to fill positions nationwide. R. at 5. Gap workers could decide whether to accept various work assignments from Edison and were not provided with healthcare or retirement benefits through the company. R. at 5. Rather, they were paid by Alpine at the completion of each assignment and were covered by Alpine's liability insurance. R. at 5.

In January of 2021, Ms. Taylor Scott ("Respondent") was hired by Alpine Staffing to work as a gap worker at Edison's Iron Mountain plant. R. at 5, 3. Scott signed an Employment Agreement with Alpine Staffing, which incorporated, by reference, a project agreement later signed between Scott and Edison. R. at 6. Edison was not named as a party to the Employment Agreement. R. at 6.

On October 12, 2021, Scott filed a suit against Edison in the United States District Court for the District of Fordham on behalf of herself and "other similarly situated employees," alleging that Edison misclassified its gap employees as exempt employees under the Fair Labor Standards Act ("FLSA"). R. at 7.; 29 U.S.C. §216(b). 150 gap workers nationwide joined the litigation, several of whom worked for Alpine or another third-party staffing agency and

contracted with one of Edison's facilities outside of Fordham. R. at 7. The District Court denied Edison's motion to dismiss the non-resident employees' claims for lack of personal jurisdiction and granted Scott's motion for certification. In doing so, the District of Fordham rejected Edison's argument that *Bristol-Myers Squibb* prevented its exercise of personal jurisdiction over Edison with respect to FLSA claims brought by non-Fordham-resident employees. R. at 7-8.; *see Bristol-Myers Squibb*, 137 S. Ct. 1773 (2017) (holding that a California state court did not have jurisdiction over defendants with respect to claims brought by out-of-state plaintiffs).

On appeal, the United States Court of Appeals for the Fourteenth Circuit affirmed. R. at 12. The Fourteenth Circuit reasoned that *Bristol-Myers Squibb* does not apply to federal claims filed in federal court and that the FLSA specifically empowers employees to bring actions on behalf of themselves "and other similarly situated employees." R. at 12.; 29 U.S.C. §216(b).

ARGUMENT

I. THIS COURT SHOULD AFFIRM THE DISTRICT AND APPELLATE COURTS' HOLDINGS THAT PERSONAL JURISDICTION IS APPROPRIATE IN THIS CASE.

Petitioners contend that, although it is undisputed that the District of Fordham has jurisdiction over the claims against Edison brought by resident employees, the claims of non-resident employees should be dismissed. R. at 7. In doing so, they rely on *Bristol-Myers Squibb,* in which the Supreme Court held that a California state court could not exercise jurisdiction in a mass tort action over defendants with regards to claims brought by non-California residents. *See* 137 S. Ct. 1773 (2017). However, *Bristol-Myers Squibb* itself says that its holding "...concerns the due process limits on the exercise of specific jurisdiction by a *State*…" and that the Court "*leave[s] open the question* whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction *by a federal court*." *Id.* at 1784 (emphasis added).

While some circuits have held that *Bristol-Myers Squibb* is applicable to Fair Labor Standards Act ("FLSA") claims brought in federal court, *see Canaday v. Anthem Co., Inc.*, 9 F.4th 392 (6th Cir. 2021); *see also Vallone v. CJS Solutions Group, LLC*, 9 F.4th 861 (8th Cir. 2021), other circuits and several district courts have held that *Bristol-Myers Squibb* is not applicable to FLSA claims. *See Waters v. Day & Zimmermann NPS, Inc.*, 23 F.4th 84, 92 (1st Cir. 2022); *see also Mason v. Lumber Liquidators, Inc.*, No. 17 CV 4780, 2019 U.S. Dist. LEXIS 80654, at *17-19 (E.D.N.Y. May 13, 2019). Here, the application of *Bristol-Myers Squibb* is unwarranted given the fundamental differences between the state-law claims brought as a coordinated mass action in California state court in *Bristol–Myers Squibb* and the FLSA collective action brought in federal court.

A. *Bristol-Myers Squibb* does not apply to federal claims filed in federal court.

In holding that *Bristol-Myers Squibb* does not apply to an FLSA case similar to Scott's, the First Circuit pointed out that federal jurisdiction is not subject to the same limitations under the Fourteenth Amendment as state jurisdiction. *See* Waters, 23 F.4th at 92. Rather, the limits on a federal court's jurisdiction are those imposed by the Fifth Amendment, which "does not bar an out-of-state plaintiff from suing to enforce their rights under a federal statute in federal court if the defendant maintained the 'requisite 'minimum contacts' with the United States.'" *Id*. (quoting *United Elec., Radio & Mach. Workers of Am. v. 163 Pleasant St. Corp.*, 960 F.2d 1080, 1085 (1st Cir. 1992)).

Much of the Court's concern about the proper jurisdiction of state courts in *Bristol-Myers Squibb*, and in its personal jurisdiction jurisprudence generally, is rooted in a concern about the proper balance of federalism. *See* 137 S. Ct. at 1780-1781; *see also World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291-292 (explaining that a key function of limitations on personal jurisdiction is to ensure "...that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system."). The Northern District of California points out that "all federal courts, regardless of where they sit, represent the same federal sovereign, not the sovereignty of a foreign state government." *Sloan v. GM, LLC*, 287 F. Supp. 3d 840, 859 (N.D. Cal. 2018). Because Scott's case was not filed in state court and does not bring state-law claims, not only are the limitations on state court jurisdiction articulated by this Court inapplicable, but a major purpose of those restrictions, to safeguard federalism, is also not at issue. R. at 7. Where federalism concerns are not at issue, "the due process analysis falls back on whether 'the maintenance of the suit...offend[s] 'traditional notions of fair play and substantial justice'…'" *Sloan*, 287 F. Supp. 3d at 859

(quoting *Int'l Shoe Co. v. Washington*, 362 U.S. 310, 316 (1945)). As will be explained in the following section, however, "traditional notions of fair play and substantial justice" will also not be offended by a finding that the District of Fordham has jurisdiction over the non-Fordham plaintiffs' claims in this case.

The Court clarified in a subsequent case, *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, that in addition to maintaining the balance of federalism and upholding "traditional notions of fair play and substantial justice," *Bristol-Myers Squibb* was also aimed at preventing forum-shopping. 141 S. Ct. 1017, 1031 (2021). This function too, however, would not be served by applying *Bristol-Myers Squibb* to the case at bar. This case was filed by Scott, who works and was harmed by Edison in the State of Fordham where she properly filed her case. R. at 5-7. Just as Scott's decision to file in the State of Fordham does not constitute an instance of forum shopping, neither does her fellow employees' decisions to opt-in to the case which she had already brought. R. at 7. FLSA §216(b) authorizes similarly situated employees to opt-in to an already pending litigation. *See* 29 U.S.C. §216(b). The statute does not grant these similarly situated employees any say over where the action is brought. *See id*. Thus, the non-Fordham employees could not have engaged in forum shopping. Additionally, even if the non-Fordham plaintiffs had been involved in selecting the forum, with respect to a federal claim being filed in federal court, plaintiffs have very little motivation to file in one district over another as the remedies in any district will be the same. *See* John F. Preis, *How the Federal Cause of Action Relates to Rights, Remedies, and Jurisdiction*, 67 FL. L. REV. 849, 853 (2016) (explaining that cause of action and remedies are same for practical purposes).

B. *Bristol-Myers* does not apply to representative litigation.

Not only does *Bristol-Myers Squibb* not apply to federal claims in federal court, but it also does not apply to this *kind* of action. In *Bristol-Myers Squibb*, plaintiffs filed eight *separate* complaints in California state court. *See* 137 S. Ct. at 1778. The case was then brought as a coordinated mass action, authorized under section 404 of the California Civil Procedure Code. *See id*. That section functions "rather like the multi-district litigation process in federal court" in that it "permits consolidation of *individual* cases, brought by *individual* plaintiffs" when those cases share a common question of fact or law. *Mussat v. IQVIA, Inc.*, 953 F.3d 441, 446 (7th Cir. 2020); *see also Waters*, 23 F.4th at 91 (explaining action in *Bristol-Myers Squibb* as the "post-hoc consolidation of eight separate claims"). In a section 404 case, the individual plaintiffs retain their status as named parties to the case. *See Mussat*, 953 F.3d at 447; *see also Lyngaas v. Curaden AG*, 992 F.3d 412, 435 (6th Cir. 2021).

By contrast, in representative litigation, "nonnamed class members…may be parties for some purposes and not for others." *Lyngaas*, 992 F.3d at 437 (quoting *Devlin v. Scardelletti*, 536 U.S. 1, 9-10 (2002)). Absent class members are not considered parties for evaluating venue or subject matter jurisdiction. *See Mussat*, 953 F.3d at 447 (citing *Appleton Elec. Co. v. Advance-United Expressways*, 484 F. 2d 126, 140 (7th Cir. 1974); *Devlin*, 536 U.S. at 10; *Exxon Mobil Corp. v. Allapattah Servs. Inc.*, 545 U.S. 546, 566-67 (2005)). The Supreme Court itself has stated that "The class-action device was designed as 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 155 (1982) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-701(1979)). The Sixth Circuit has interpreted this language to mean that, when assessing whether it has personal jurisdiction over the defendant in a class action, a "court need analyze only the claims

raised by the named plaintiff, who in turn represents the absent class members." *Lyngaas*, 992 F.3d at 435. The majority in *Bristol-Myers Squibb* characterized its decision as a "straightforward application…of settled principles of personal jurisdiction." *Bristol-Myers Squibb*, 137 S. Ct. at 1783. Accordingly, the First, Sixth, and Seventh Circuits have found no reason to depart from Supreme Court precedent for evaluating personal jurisdiction in representative litigation by applying *Bristol-Myers Squibb* to such cases. *See Waters*, 23 F.4th at 92-93; *Lyngaas*, 992 F.3d at 435; *Mussat*, 953 F.3d at 447.

Not only does Supreme Court jurisprudence dictate that jurisdiction in representative litigation should be evaluated with respect to only the named plaintiffs, but the *purposes* of the minimum contacts requirement for specific jurisdiction also support such a conclusion. One of the main purposes of the specific jurisdiction requirements is to protect "...the defendant against the burdens of litigation in a distant or inconvenient forum…" *World-Wide Volkswagen*, 444 U.S. at 291-292. In *Bristol-Myers Squibb*, over 700 plaintiffs filed eight separate complaints, alleging products liability, negligent misrepresentation, and misleading advertising claims. *See Bristol-Myers Squibb*, 137 S. Ct. at 1778. In that situation, the Court found that having to defend against the claims of 592 non-resident plaintiffs in addition to the claims of the 86 California plaintiffs in a state that is not the corporation's headquarters or place of incorporation would have increased the burden on the defendant. *See id*. at 1780 ("Assessing this burden obviously requires a court to consider the practical problems resulting from litigating in the forum…"). This additional burden comes not from the number of out-of-state plaintiffs, but rather from the quality of their claims and the potential need for a large amount of factual discovery unique to each plaintiff. *See Lyngaas*, 992 F.3d at 435 (quoting *Sanchez v. Launch Tech. Workforce Sols., LLC*, 297 F. Supp. 3d 1360, 1366 (N.D. Ga. 2018) ("These individual issues might "present

significant variations" such that a defense would require different legal theories or different evidence.")).

By contrast, the case against Edison does not present the same narrow circumstance that justified breaking with the Supreme Court's personal jurisdiction jurisprudence in *Bristol-Myers Squibb*. Unlike in *Bristol-Myers Squibb*, the non-residents' claims at issue in the case against Edison (1) have been filed in a single complaint, (2) complain of a single company-wide policy, articulated in the Independent Contractor Handbook, and (3) contain the same cause of action under the FLSA. R. at 6-7. Thus, the nature of these claims makes them much less likely to result in unique discovery as to each plaintiff. *See Sloan*, 287 F. Supp. 3d at 840 (finding no increased burden on defendant having to litigate the same legal questions and facts, even where claims by out-of-state plaintiffs included additional state claims); *see also Mason*, 2019 U.S. Dist. LEXIS 80654 at *18 (comparing the burden placed on Bristol-Myers to burden placed on FLSA defendant). The additional burden that Bristol-Myers would have faced in having to defend against a host of different claims with varying factual circumstances is not present in the case against Edison. Additionally, the remedies that plaintiffs seek under the FLSA, a federal statute, will be the same no matter where the cases are litigated. 29 U.S.C. §216 (granting single, federal cause of action). Accordingly, there is no risk that Edison will lose a legal advantage that it might have had in another state's court, as might have been the case in *Bristol-Myers Squibb*, where each of the non-California plaintiffs' claims should have been subject to their own state's tort law, which may or may not have provided an advantage to the defendant.

Under these circumstances, departing from personal jurisdiction jurisprudence would not only defy precedent and be an overly broad application of *Bristol-Myers*, but doing so would not even serve the function of protecting the defendant "against the burdens of litigation in a distant

or inconvenient forum." *World-Wide Volkswagen*, 444 U.S. at 291-292. Thus, there is no risk that allowing the non-Fordham plaintiffs' claims to go forward in the District of Fordham would "offend 'traditional notions of fair play and substantial justice.'" *Id.* at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

C. Applying Rule 4(k)(1) to limit the jurisdiction of a federal court runs afoul of federalism and personal jurisdiction jurisprudence and frustrates the purposes of the FLSA.

While the Sixth and Eighth Circuits have found that Rule 4(k)(1) operates as a limitation on a federal court's exercise of jurisdiction over non-resident plaintiffs, such a conclusion requires a reading of Rule 4 which is inconsistent with its plain meaning as well as the Court's precedent with regards to personal jurisdiction in representative litigation. *See Canaday*, 9 F.4th at 392; *see also Vallone*, 9 F.4th at 861. The First Circuit, in finding that Rule 4(k)(1) does not limit jurisdiction in this way, has noted that the Rule's title, "Summons," "...suggests that it is only concerned with service." *Waters*, 23 F.4th at 93 (citing *Amendments to Fed. R. Civ. P. 4*, 146 F.R.D. 401 559 (highlighting that title was changed from "Process" to "Summons" to show that the rule was applicable only to summons)). Additionally, reading Rule 4 as imposing jurisdictional requirements conflicts with Rule 82 which states that "these rules do not extend or limit the jurisdiction of the district courts." *Id.* at 94. Accordingly, Rule 4 should not be read to constrain a federal court's power to act after a summons has been served. *Id.*

The argument that Rule 4(k)(1) should govern jurisdiction because the FLSA does not contain a service of process provision ignores the plain meaning of the FLSA and focuses instead on legislative silence with regards to a jurisdictional grant. R. 24. The FLSA specifically states that claims can be brought "in any Federal or State court of competent jurisdiction by any one or more employees for and on behalf of himself... and other employees similarly situated." 29

U.S.C. §216(b). It does not limit the definition of "similarly situated" employees to those who work or reside in the same state in which the action has been brought. 29 U.S.C. §216(b). Rather, the plain meaning of the FLSA reflects a statute aimed at "efficient enforcement of wage and hour laws against large, multi-state employers." *Waters*, 23 F.4th at 97 (quoting *Hoffman-LaRoche v. Sperling*, 493 U.S. 165, 173 (1989) (further stating that the "broad remedial goal" of the FLSA "should be enforced to the full extent of its terms"); *see also Mason*, 2019 U.S. Dist. LEXIS 80654 at *18-19. Edison, which manufactures and sells across thirteen states, is precisely the kind of employer that the statute is designed to cover. R. at 3.

CONCLUSION

For the reasons stated above, Respondent respectfully requests that the judgment of the United States Court of Appeals for the Fourteenth Circuit be affirmed

Applicant Details

First Name	**Jared**
Last Name	**Bedell**
Citizenship Status	**U. S. Citizen**
Email Address	**jared.bedell@nyu.edu**
Address	**Address** **Street** **5 Viburnum Place** **City** **New Hartford** **State/Territory** **New York** **Zip** **13413** **Country** **United States**
Contact Phone Number	**3155348348**

Applicant Education

BA/BS From	**American University**
Date of BA/BS	**May 2020**
JD/LLB From	**New York University School of Law** **https://www.law.nyu.edu**
Date of JD/LLB	**May 22, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**New York University Annual Survey of American Law**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Hershkoff, Helen
helen.hershkoff@nyu.edu
212-998-6715

Francis, Daniel
daniel.francis@law.nyu.edu
212-998-6425

Hewitt, Daniel
Daniel.Hewitt@law.njoag.gov
(732) 266-1768

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Jared Anthony Bedell
110 West 3rd Street, Apt. 1503B
New York, New York, 10012

06/12/2023

The Honorable Juan R. Sanchez
United States District Court
Eastern District of Pennsylvania
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Chief Judge Sanchez,

My name is Jared Bedell, and I am a law student at the New York University School of Law. I am applying for a clerkship in your chambers for the 2024-2025 term.

Enclosed please find my resume, law school transcript, writing sample, and three letters of recommendation. My writing sample is an excerpt of a Note written for Judge Jed Rakoff's Class Actions seminar. It has been accepted for publication in *NYU Annual Survey of American Law*. Please see the writing sample's cover letter for more information. Letters of recommendations from the following people are included:

Helen Hershkoff, Professor,
New York University School of Law,
hershkoff@mercury.law.nyu.edu.

Daniel Hewitt, Deputy Attorney General,
New Jersey Attorney General's Office,
Daniel.Hewitt@law.njoag.gov,
(732) 266-1768.

Daniel Francis, Professor,
New York University School of Law,
daniel.francis@law.nyu.edu,
(202) 538-1775.

I served as a research assistant and teaching assistant for Professor Hershkoff's civil procedure class. I took Professor Francis' antitrust law class and was his research assistant. Daniel Hewitt served as my supervisor for my 1L summer internship with the New Jersey Attorney General's Office.

Thank you for your time and consideration. Please feel free to reach out if you have any questions. I am available by email, jared.bedell@nyu.edu, and by phone, (315) 534-8348.

Respectfully,

/s/
Jared Anthony Bedell

JARED BEDELL
110 West Third Street, Apt. 1503B, New York, NY 10012
(315) 534-8348 Jared.Bedell@nyu.edu

EDUCATION

NEW YORK UNIVERSITY SCHOOL OF LAW, New York, NY
Candidate for J.D., May 2024
Unofficial GPA: 3.599
Honors: *NYU Annual Survey of American Law*, Managing Editor for Solicitations
Activities: NYS Attorney General's Office, Antitrust Enforcement Externship (Spring 2024)
Professor Daniel Francis, Research Assistant (Spring 2023)
Professor Helen Hershkoff, Research Assistant (Summer/Fall 2022)
Trial Advocacy Society, Member
Publications: Note, *Antitrust Class Actions and Rule 23: The Barriers to Claims in Zero-Price Platform Markets*, N.Y.U. ANN. SUR. AM. L. (forthcoming 2023).

AMERICAN UNIVERSITY, Washington, DC
M.P.A., May 2021
Honors: Pi Alpha Alpha

AMERICAN UNIVERSITY, Washington, DC
B.A. in Political Science and Economics, *summa cum laude*, May 2020
Honors: Undergraduate Certificate in Community-Based Research, Pi Sigma Alpha, Dean's List
Activities: Residence Hall Association and National Residence Hall Honorary, President

EXPERIENCE

SULLIVAN & CROMWELL, LLP, New York, NY
Summer Associate, May 2023-August 2023

UNITED STATES ATTORNEY'S OFFICE FOR THE SOUTHERN DISTRICT OF NEW YORK, New York, NY
Extern, January 2023-April 2023
Conducted legal research regarding the novel application of statutes. Drafted a prosecution memo. Reviewed and identified relevant electronic evidence. Participated in trial preparation.

PROFESSOR HELEN HERSHKOFF, NYU SCHOOL OF LAW, New York, NY
Teaching Assistant, August 2022-December 2022
Prepared materials for and hosted weekly small group review sessions for the Procedure class. Taught a review class. Answered student questions weekly. Moderated a discussion forum during the week before the final.

NEW JERSEY DIVISION OF LAW, PROFESSIONAL BOARDS PROSECUTION SECTION, Newark, NJ
Summer Intern, May 2022-August 2022
Drafted briefs and verified complaints for Motions to Proceed Summarily for the revocation or suspension of professional licenses. Researched and prepared memos on legal questions regarding medical procedures and programs.

THE OFFICE OF CONGRESSMAN ANTHONY BRINDISI, Washington, DC and Utica, NY
Congressional Intern, January 2020-March 2020; ***District Intern***, May 2019-August 2019
Worked with constituents to address their needs. Researched and attended webinars on topics relevant to legislation.

DEPARTMENT OF JUSTICE, CIVIL DIVISION-APPELLATE STAFF, Washington, DC
Intern, August 2019-December 2019
Maintained and organized files. Supported attorneys.

COMMUNITY BASED RESEARCH SCHOLAR, Washington, DC
Member, August 2017-May 2020
Drafted a research project summarization, winning best presentation at the Undergraduate Research Symposium.

ADDITIONAL INFORMATION

Eagle Scout. Enjoy chess, jigsaw puzzles, and word jumbles.

Name: **Jared A Bedell**
Print Date: **06/05/2023**
Student ID: **N15756070**
Institution ID: **002785**
Page: **1 of 1**

New York University
Beginning of School of Law Record

Fall 2021

School of Law
Juris Doctor
Major: Law

Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Tyler Rose Clemons			
Torts	LAW-LW 11275	4.0	B
Instructor: Mark A Geistfeld			
Procedure	LAW-LW 11650	5.0	A
Instructor: Helen Hershkoff			
Contracts	LAW-LW 11672	4.0	A-
Instructor: Richard Rexford Wayne Brooks			
1L Reading Group	LAW-LW 12339	0.0	CR
Instructor: Roderick M Hills John A Ferejohn			

	AHRS	EHRS
Current	15.5	15.5
Cumulative	15.5	15.5

Spring 2022

School of Law
Juris Doctor
Major: Law

Constitutional Law	LAW-LW 10598	4.0	A
Instructor: Melissa E Murray			
Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Tyler Rose Clemons			
Legislation and the Regulatory State	LAW-LW 10925	4.0	A
Instructor: Adam B Cox			
Criminal Law	LAW-LW 11147	4.0	A
Instructor: Ekow Nyansa Yankah			
Financial Concepts for Lawyers	LAW-LW 12722	0.0	CR

	AHRS	EHRS
Current	14.5	14.5
Cumulative	30.0	30.0

Fall 2022

School of Law
Juris Doctor
Major: Law

Criminal Procedure: Fourth and Fifth Amendments	LAW-LW 10395	4.0	B+
Instructor: Andrew Weissmann			
Antitrust Law	LAW-LW 11164	4.0	B+
Instructor: Daniel S Francis			
Evidence	LAW-LW 11607	4.0	B+
Instructor: Erin Murphy			
Research Assistant	LAW-LW 12589	1.0	CR
Instructor: Helen Hershkoff			
Class Actions Seminar	LAW-LW 12721	2.0	B+
Instructor: Jed S Rakoff			
Class Actions Seminar: Writing Credit	LAW-LW 12727	1.0	A
Instructor: Jed S Rakoff			

	AHRS	EHRS
Current	16.0	16.0
Cumulative	46.0	46.0

Spring 2023

School of Law
Juris Doctor
Major: Law

Prosecution Externship - Southern District	LAW-LW 10835	2.0	B+
Seminar			
Instructor: Margaret S Graham Negar Tekeei			
Prosecution Externship - Southern District	LAW-LW 11207	3.0	CR
Instructor: Margaret S Graham Negar Tekeei			
Mental Disability Law Seminar	LAW-LW 11545	2.0	A-
Instructor: Robert M Levy			
Property	LAW-LW 11783	4.0	B+
Instructor: David Jerome Reiss			
Criminal Securities and Commodities Fraud Seminar	LAW-LW 12117	2.0	A-
Instructor: Raymond Joseph Lohier, Jr. Steven Peikin			
Research Assistant	LAW-LW 12589	1.0	CR
Instructor: Daniel S Francis			

	AHRS	EHRS
Current	14.0	14.0
Cumulative	60.0	60.0

Staff Editor - Annual Survey of American Law 2022-2023

End of School of Law Record

TRANSCRIPT ADDENDUM FOR NYU SCHOOL OF LAW
JD CLASS OF 2023 AND LATER & LLM STUDENTS

I certify that this is a true and accurate representation of my NYU School of Law transcript.

Grading Guidelines

Grading guidelines for JD and LLM students were adopted by the faculty effective fall 2008. These guidelines represented the faculty's collective judgment that ordinarily the distribution of grades in any course will be within the limits suggested. An A + grade was also added.

Effective fall 2020, the first-year J.D. grading curve has been amended to remove the previous requirement of a mandatory percentage of B minus grades. B minus grades are now permitted in the J.D. first year at 0-8% but are no longer required. This change in the grading curve was proposed by the SBA and then endorsed by the Executive Committee and adopted by the faculty. Grades for JD and LLM students in upper-level courses continue to be governed by a discretionary curve in which B minus grades are permitted at 4-11% (target 7-8%).

First-Year JD (Mandatory)	**All other JD and LLM (Non-Mandatory)**
A+: 0-2% (target = 1%) (see note 1 below)	A+: 0-2% (target = 1%) (see note 1 below)
A: 7-13% (target = 10%)	A: 7-13% (target = 10%)
A-: 16-24% (target = 20%)	A-: 16-24% (target = 20%)
Maximum for A tier = 31%	***Maximum for A tier = 31%***
B+: 22-30% (target = 26%)	B+: 22-30% (target = 26%)
Maximum grades above B = 57%	***Maximum grades above B = 57%***
B: remainder	B: remainder
B-: 0-8%*	B-: 4-11% (target = 7-8%)
C/D/F: 0-5%	C/D/F: 0-5%

The guidelines for first-year JD courses are mandatory and binding on faculty members; again noting that a mandatory percentage of B minus grades are no longer required. In addition, the guidelines with respect to the A+ grade are mandatory in all courses. In all other cases, the guidelines are only advisory.

With the exception of the A+ rules, the guidelines do not apply at all to seminar courses, defined for this purpose to mean any course in which there are fewer than 28 students.

In classes in which credit/fail grades are permitted, these percentages should be calculated only using students taking the course for a letter grade. If there are fewer than 28 students taking the course for a letter grade, the guidelines do not apply.

Important Notes

1. The cap on the A+ grade is mandatory for all courses. However, at least one A+ can be awarded in any course. These rules apply even in courses, such as seminars, where fewer than 28 students are enrolled.
2. The percentages above are based on the number of individual grades given – not a raw percentage of the total number of students in the class.
3. Normal statistical rounding rules apply for all purposes, so that percentages will be rounded up if they are above .5, and down if they are .5 or below. This means that, for example, in a typical first-year class of 89 students, 2 A+ grades could be awarded.
4. As of fall 2020, there is no mandatory percentage of B minus grades for first-year classes.

NYU School of Law does not rank students and does not maintain records of cumulative averages for its students. For the specific purpose of awarding scholastic honors, however, unofficial cumulative averages are calculated by the Office of Records and Registration. The Office is specifically precluded by faculty rule from publishing averages and no record will appear upon any transcript issued. The Office of Records and Registration may not verify the results of a student's endeavor to define his or her own cumulative average or class rank to prospective employers.

Scholastic honors for JD candidates are as follows:

Pomeroy Scholar:	Top ten students in the class after two semesters
Butler Scholar:	Top ten students in the class after four semesters
Florence Allen Scholar:	Top 10% of the class after four semesters
Robert McKay Scholar:	Top 25% of the class after four semesters

Named scholar designations are not available to JD students who transferred to NYU School of Law in their second year, nor to LLM students.

Missing Grades

A transcript may be missing one or more grades for a variety of reasons, including: (1) the transcript was printed prior to a grade-submission deadline; (2) the student has made prior arrangements with the faculty member to submit work later than the end of the semester in which the course is given; and (3) late submission of a grade. Please note that an In Progress (IP) grade may denote the fact that the student is completing a long-term research project in conjunction with this class. NYU School of Law requires students to complete a Substantial Writing paper for the JD degree. Many students, under the supervision of their faculty member, spend more than one semester working on the paper. For students who have received permission to work on the paper beyond the semester in which the registration occurs, a grade of IP is noted to reflect that the paper is in progress. Employers desiring more information about a missing grade may contact the Office of Records & Registration (212-998-6040).

Class Profile

The admissions process is highly selective and seeks to enroll candidates of exceptional ability. The Committees on JD and Graduate Admissions make decisions after considering all the information in an application. There are no combination of grades and scores that assure admission or denial. For the JD Class entering in Fall 2021 (the most recent entering class), the 75th/25th percentiles for LSAT and GPA were 174/170 and 3.93/3.73.

Updated: 10/4/2021

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June 5, 2023

Dear Judge:

I am writing to recommend Jared Bedell for a judicial clerkship with you following his graduation from New York University School of Law in May 2024. I know Jared well, as a student, as a Research Assistant, and as a Teaching Assistant, and have confidence that he would be an excellent judicial clerk.

Jared was a student in my 1L course in Civil Procedure, which because of the pandemic I was compelled to teach via Zoom. Learning in a remote environment proved to be a challenge for some students, but Jared was able to rise to the occasion and stayed focused, energetic, and engaged. He performed very well on the final examination, showing a mastery of the material and a fine analytical mind. Based on his achievement and my sense of his inter-personal skills, I invited him to serve as a Teaching Assistant for the next year's course.

My TAs are an integral part of the course. Each is responsible for convening weekly sessions to review the assigned readings, helping to prepare review sheets and answers to model problems, and leading large-group review sessions at the end of each unit. Both the weekly and large-group sessions are optional for the 1L students, and the 1Ls often "vote with their feet," migrating to work with particular TAs who are especially clear, engaged, and kind. I was impressed to see that Jared had a regular following and many fans. He was able to deal with challenging questions that the 1Ls posed about civil procedure as well as their anxieties and uncertainties (typical of the first-year experience but magnified during the pandemic). His calm demeanor, cheerful attitude, and clarity of expression are all qualities that would be helpful as a judicial clerk.

Jared also worked with me as a part-time Research Assistant during the summer following his 1L year. I am responsible for volume 14 of Wright & Miller's Federal Practice and Procedure, which covers the United States as a party. The material addresses the special position of the United States as a plaintiff in federal court actions, as well as abstruse doctrines of sovereign immunity when the government appears as a defendant. Jared was tasked with updating the section providing an overview of the general principles governing the United States as a plaintiff, and the cases touched on the scope of jurisdiction under 28 U.S.C. § 1345, the scope and appropriateness of federal common law in place of state rules of decision, statutes of limitations, and special statutes such as the Miller Act. Some of the material is familiar to 1Ls (for example, whether the *Erie* doctrine applies to the United States as a party),

but much of it is new, and Jared showed himself to be nimble, curious, and highly adept as a careful reader of cases. He also quickly mastered the style and form of the treatise, and was exceptionally reliable and attentive to deadlines. In my view, the skills he showed are all vital for a judicial clerk.

In addition to his work with me, Jared also found time to undertake significant extra-curricular activities and demanding course work. As a 2L he served as Class Representative to the Student Bar Association and was Chair of the Advocacy Committee, meeting weekly with Law School administrators on a range of student-centered issues. This position requires sophistication and maturity, and Jared can claim both qualities. He also was a member of the Trial Advocacy Society and participated in two internal competitions; was enrolled in an externship with the United States Attorney's Office of the Southern District of New York; and wrote an "option A paper" for his Class Actions seminar (taught by Judge Rakoff) on antitrust claims in markets in which there is no price for consumers (the paper has been accepted for publication in the Annual Survey of American Law). As the topic of that paper suggests, Jared is interested in antitrust as well as administrative enforcement generally, and for now will be a summer associate at Sullivan & Cromwell in New York City, eager to have exposure to a generalist practice and to learn more about professional opportunities.

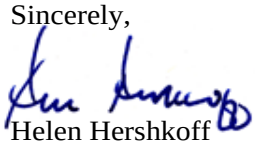
Jared's energy and commitment can be gleaned from his experiences before coming to NYU Law—at American University he completed the equivalent of a "four plus one" program, but managed to graduate in three years, earning a B.A. as well as a Master of Public Administration. During college, Jared showed the leadership skills which have been on full display as a law student, serving as President of the Resident Hall Association (managing a budget of $150,000 and supervising five vice presidents and a general assembly of 30 participants) and then as President of the National Residence Hall Honorary. A judicial clerkship is a position of trust, and Jared has a clear sense of institutional role and professional norms.

Finally, I typically ask students to describe themselves in a few adjectives. Jared's were spot on—considerate, inquisitive, and diligent. To these I would add analytically acute, careful, and open minded. I have great confidence in his abilities and character, and am very pleased to recommend him to you as a judicial clerk.

If you have any questions, please do not hesitate to contact me.

Thank you for your consideration.

Sincerely,



Helen Hershkoff

NYU | LAW

DANIEL FRANCIS
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May 30, 2023

Dear Judge:

I write to recommend Jared Bedell to you for a judicial clerkship.

My name is Daniel Francis: I am an Assistant Professor of Law at NYU School of Law, where I teach and write about antitrust and regulation. I was Jared's Antitrust Law professor in the Fall of 2022, and he has performed work as a Research Assistant for me since that time, undertaking research on the application of antitrust law to unlawful commercial activity. We have also met and talked about antitrust issues in office hours.

Jared was a terrific participant in our antitrust classroom. He contributed actively and effectively to classroom discussion, offering thoughtful perspectives on a wide range of antitrust issues, and demonstrating real engagement with the subject matter. His end-of-year examination also contained much to appreciate. Jared built on this foundation by choosing a worthy and timely antitrust topic for his writing project in his Spring class actions seminar, where he earned an "A" grade from Judge Rakoff.

More generally, Jared is a diligent and effective law student with a strong record, who has supplemented his academic work with a portfolio of other activities. He has undertaken a demanding externship with the U.S. Attorney's Office for the Southern District of New York—requiring a significant investment of time and energy—and has served as a research and teaching assistant alongside his studies. In his work as a research assistant for me, Jared helped locate and summarize a range of legal materials, making a valuable contribution to my research program. And in addition to his law school work, Jared also has assembled an impressive record of service roles, ranging from work supporting political campaign to internships with DOJ's civil appellate team and the New Jersey Division of Law. All in all, he has assembled a fine record demonstrating aptitude and diligence in a range of areas, and evincing a strong toolkit of core skills.

Jared would be an effective and diligent law clerk, and I am pleased to support his application. Please do not hesitate to let me know if I can answer any additional questions, or otherwise assist you as you consider Jared's application. You can reach me by phone on 202-538-1775 or by email at daniel.francis@law.nyu.edu at any time.

Yours sincerely,

Daniel Francis

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SHEILA Y. OLIVER
Lt. Governor

MATTHEW J. PLATKIN
Attorney General

MICHAEL T.G. LONG
Director

Your Honor:

I am honored to write this recommendation for Jared Bedell for a clerkship with your chambers. Throughout the summer of 2022, Jared served as an intern for the Professional Boards Prosecution section within the Division of Law, New Jersey Office of the Attorney General. During that summer I worked as Jared's direct supervisor and oversaw all of his work. In his capacity as an intern, Jared drafted various pleadings, motions, and research memoranda. Jared also assisted with trial preparation.

Throughout the summer it was a pleasure to work with Jared, whose keen attention to detail and ability to digest complex legal issues, provided invaluable assistance to multiple deputies often at the same time. Jared's work was also thorough and meticulous.

Jared particularly excelled in the drafting of a verified complaint and the accompanying motion to proceed summarily. That matter invovled a doctor who is alleged to have engaged in various fraudulent activities throughout the COVID-19 Pandemic. Jared not only did an excellent job drafting the required documents, he skillfully navigated a complex area of law that continuously evolved throughout the relevant time period. Jared's careful approach to understanding and researching legal issues is complimented by his ability to timely complete multiple difficult assignments, often at the same time.

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Jared is also a pleasure to work with, a true team player, and a pleasure to supervise. Every day Jared was enthusiastic regarding every assignment and always put his best foot forward. Jared showed a genuine interest in every assignment, and a true interest and passion for the law.

I give Jared my highest recommendation and know he will be a true asset to you. If you have any questions please don't hesitate to call me on my direct line at (973) 648-2353 or my personal cell phone at (732) 266-1768. I can also be reached via email at Daniel.Hewitt@law.njoag.gov.

Respectfully submitted,

Daniel Evan Leef Hewitt, Esq.

Bedell Writing Sample Cover Sheet:

Below is an excerpt of my forthcoming Note, *Antitrust Class Actions and Rule 23: The Barriers to Claims in Zero-Price Platform Markets*, N.Y.U. ANN. SUR. AM. L. (forthcoming 2023). This was written for the Writing Credit portion of my Class Actions seminar. As part of the seminar, it received generalized feedback when it was halfway completed from Judge Jed Rakoff. As part of the Note editing process, it also received a brief first look by the former *NYU Annual Survey of American Law* Notes Editor. This consisted of comments on areas to improve upon as well as minor proof reading.

This Note was inspired by the Federal Trade Commission's allegations of monopolization against Meta. I began by questioning how consumers in the market of social media, where there is no price, could have enough common evidence to certify an antitrust class. The market for social media is a zero-price platform market: consumers provide attention and personal information to the platform that then compiles it and sells it to advertisers.

Only Part III is provided below as the excerpt. Part I provided a detailed analysis of what costs do exist in a zero-price market and how they impact consumers. Part II discussed antitrust class actions and the requirements of Rule 23. Finally, Part IV offered a broad critique and defense of the solutions, returning to the basic goals of private antitrust enforcement. I am happy to provide the entire Note upon request.

Part III

A. The Barriers and Solutions

The barriers of the predominance analysis, *Daubert* challenges, and ascertainability are uniquely challenging for an antitrust class action that alleges an anticompetitive harm in a zero-price platform market.

The complexity and diverse supply and demand dynamics of platform markets offer several challenges to meeting the predominance requirement.[1] The anticompetitive harms themselves can be spread across multiple different sides of the platform, impacting individuals in different ways depending on which part or feature of the platform they use;[2] for example, "Apple's exclusionary conduct happens across its IAP tie, its limits on third-party access to NFC and Siri and its self-preferencing over push-notification advertising, affecting developers and consumers in different markets."[3] Without alternatives available, proving divergent consumer losses requires distinct and hard to calculate evidence.[4] Individualized conduct, differing impacts, and differing levels of demand for each component, are likely to overwhelm the common evidence used in a model of proof of injury and damages.[5]

To add to the complexity of platform markets, anticompetitive impacts in zero-price markets are largely qualitative and complex to measure.[6] The data regarding attention and information costs is highly differentiated between individual consumers and their situations.[7] The

[1] Shili Shao, Note, *Antitrust in the Consumer Platform Economy: How Apple Has Abused Its Mobile Platform Dominance*, 36 BERKLEY TECH. L.J. 353, 405 (2021).
[2] *Id.* at 406.
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] John M. Newman, *Antitrust in Zero-Price Markets: Foundations*, 164 U. PA. L. REV. 149, 179 (2015).
[7] *See Id.* at 180–81 (discussing that consumers not only experience different advertisements, different types of advertisements, and have different reactions, but that information collected on them can be dependent on how they interact individually, and what they search and each individual and advertiser values the personal information collected differently).

information collected and overall experiences on these platforms is often reactive to personal use and interaction with the platform.[8] Accurate and sufficient estimations of common damages or impacts in zero-price markets can be difficult due to this complexity and individualization.[9]

1. Using Established Antitrust Theories

One of the first barriers to a successful antitrust class action in a zero-price platform market would be the application of the predominance requirements to the first element of a case: establishing the antitrust violation that occurred. The theory of harm is essential to building a case, making this an important first consideration. Meeting the predominance requirement for this element can be relatively easy, even in cases of more complex monopolization like those involving platforms.[10] The solution to this barrier is to use existing and recognized theories of harm, as monopolization or an unlawful restraint of trade theories generally rely on common evidence. Where this solution can become more complex is when the theory of harm itself relies on information costs such a predation claim. These information costs are the very part of zero-price markets that creates the individual complexities the can overwhelm the common evidence.

The District Court for the Northern District of California took a unique approach in *Klein*. In this motion to dismiss a consumer class action against Facebook, the antitrust violation was the obtaining of monopoly power through misrepresentation in violation of Section 2 of the

[8] *Id.*
[9] *Id.*
[10] *See*, *e.g.*, AstraZeneca AB v. UFCW (*In re* Nexium Antitrust Litig.), 777 F.3d 9, 18 ("Defendants do not dispute that the four Rule 23(a) requirements were met here."); *In re* Wellbutrin XL Antitrust Litig., No. 08-2431, 2011 U.S. Dist. LEXIS 90075, at *13–14 (E.D. Pa. Aug. 11, 2011) (analyzing Rule 23(a)(2) requirements in only two short paragraphs for a Sherman Act, §2 violation claim); *In re* Suboxone (Buprenorphine Hydrochlorine & Naloxone) Antitrust Litig., 967 F.3d 264, n.9 (3d Cir. 2020) ("Reckitt argues that the lawfulness of pricing conduct renders class certification improper. Regardless, in this case, the allegedly unlawful nonpricing conduct could be established via common evidence and thus satisfy the commonality requirement."); Stromberg v. Qualcomm Inc., 14 F.4th 1059, 1066 (9th Cir. 2021) ("Qualcomm does not contest that Plaintiffs met Rule 23(a)'s requirements; rather, it contests class certification under Rule 23(b)(3) and (b)(2)."); Ploss v. Kraft Foods Grp., 431 F. Supp. 3d 1003, 1011–15 (N.D. Ill. 2020) (explaining that in this Sherman Act, §2 violation, Kraft did not challenge Rule 23(a)(2)).

Sherman Act.[11] The court found the allegations regarding the consumers' data privacy claims to be plausible and sufficient to reject the motion.[12] The misrepresentation in this case was the deception of users regarding the use and monetization of their data as well as Facebook's privacy policy.[13] This argument is clever: instead of using pricing or quality based data on the information collected, it focuses on the misrepresentations made. The theory of harm is monopolization through misrepresentation; the misrepresentation is the anticompetitive conduct that allows for Facebook to better position itself and exclude rivals from the market. This is an innovative way to focus on the information costs in the lens of an established anticompetitive theory.

While the first element in an antitrust class action may easily meet the predominance requirements, proving the second and third elements in antitrust class actions through common evidence is where many of the issues begin: the elements of common impact and reasonable estimation of damages.[14]

2. <u>Common Impact in Zero-price and Representative Samples</u>

One concern regarding both common impact of injury resulting from the antitrust harm and the estimation of damages is the valuation of privacy. The common impact or harm in these cases would be the increased use of personal data at a supracompetitive level. This means that because of the illegal anticompetitive conduct, the company-imposed information costs, or the taking of user data, at a level higher than they would have been able to in a competitive market. However, measuring the value of privacy is a complicated endeavor, especially when attempting

[11] *Id.* at 786.
[12] Klein v. Facebook, Inc., 580 F. Supp. 3d 743, 794–96 (N.D. Cal. 2022).
[13] *Id.*
[14] *See In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 311–312 (3d Cir. 2008).

to find the "competitive" level.[15] Comparatively, the competitive price is the price in which the aggregated supply of the good meets the aggregated demand for that good. In typical markets consumers value each good differently, some will even get surplus enjoyment because they were willing to pay a much higher price. However, monetary price is a way of standardizing each person's valuation of the good to then aggregate it and find the optimal price in a perfectly competitive market. The very nature of information costs challenges that standardization across consumers and thus challenges what is competitive and the impact and damages analysis. However, classwide evidence of an antitrust injury and common impact can be sufficiently proved for predominance through the use of economic models and averaging.

In what is often called the "privacy paradox," consumers will state that they highly value their personal information, and yet studies of their actions suggest that their actual preferences place little value on privacy.[16] For example, a Pew Research Study has found that 79% of Americans are somewhat or very concerned about how companies use their personal data and 81% believe that the risks outweigh the benefits;[17] yet, 38% of adults say they *sometimes* read the privacy policies they agree to and 36% say they *never* read it before agreeing to the policies.[18] If individual evidence of privacy valuations are required to determine which consumers experienced an injury from the anticompetitive nature and calculate the competitive level, this would likely overwhelm the common evidence that predominance requires.

[15] Garrett Glasglow & Chris Stomberg, *Consumer Welfare and Privacy in Antitrust Cases—An Economic Perspective*, 35 ANTITRUST ABA 46, 47 (2020).
[16] *Id.*
[17] Brooke Auxier, Lee Rainie, Monica Anderson, Andrew Perrin, Madhu Kumar & Erica Turner, *Americans and Privacy: Concerned, Confused, and Feeling Lack of Control Over Their Personal Information*, PEW RESEARCH CENTER, 1 (Nov. 15, 2019) https://www.pewresearch.org/internet/2019/11/15/americans-and-privacy-concerned-confused-and-feeling-lack-of-control-over-their-personal-information/ [https://perma.cc/YXB7-CZPT].
[18] *Id.* at 1.

Courts have historically struggled with predominance in markets of a highly individualized nature where each consumer faces unique costs and conditions.[19] In 2005, the Eight Circuit refused to certify an antitrust class due to an inability to prove common impact because the price of the product was "dependent on geographic location, growing conditions, institutional discounts, and consumer preferences . . . ."[20]

The best solution to this problem would be to take the approach suggested in *Tyson*, where the Court held statistically representative models and samples could be used to find class wide liability. The specific solution would be to run regression analysis on representative statistical samples to find the common impact of the anticompetitive behavior.[21] Zero-price platforms are a market where common statistical samples would meet the limiting requirements of *Tyson*;[22] individuals could use a common statistical sample if they were suing individually and it could be used if there is not a better alternative method of reliably achieving common evidence.[23] The Ninth Circuit, relying on *Tyson*, confirms that highly individualized differences in the costs to each consumer do not "undermine the regression model's ability to provide evidence of common *impact*."[24] While this individualization can be solved through regression analysis and statistical samples, this does not address the need for the court to analyze damages on an individualized basis.[25]

Assuming *Daubert* challenges against plaintiffs' experts do not succeed, proving common impact through statistical and economic regression analysis and models should be

[19] 6 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS 658, 668–69 (5th ed. 2011).
[20] *Id.* at 669.
[21] *See* Tyson Foods, Inc. v. Bouaphakeo, 577 U.S. 442, 457–58 (2016).
[22] *See Id.*
[23] *See Id.*
[24] Olean Wholesale Grocery Coop. v. Bumble Bee Foods LLC, 31 F.4th 651, 680 (9th Cir. 2022) (en banc), *cert. denied*, 2022 WL 16909174 (Nov. 14, 2022).
[25] *Id.*

successful. *In Re Google Play Store Antitrust Litigation*, 2022 U.S. Dist. LEXIS 213670, decided by the Northern District of California, is a great example. While primarily focused on supracompetitive pricing concerns as the impact of anticompetitive actions taken by Google, the antitrust consumer class was certified despite the individualized costs among consumers.[26] The Rule 23(b)(3) class consisted of all consumers in certain states "who paid for an app through the Google Play Store or paid for in-app digital content . . . ."[27] The expert found common classwide proof of impact on consumers through a "pass-through formula" that was then input into the Rochet-Tirole model.[28] In simpler terms, this is a model centered around the concept of transaction platforms, like Google, that determined how much the of the "supracomeptitive cost imposed on developers . . . is passed through to consumers."[29] The model found that consumers were paying 30 cents per paid app beyond what they would in a competitive market.[30] This economic modeling is the averaging of different prices consumers paid on different apps across different categories to different developers.[31] This high individualization was able to be averaged and modeled to successfully show classwide proof of common antitrust impact.

Applying the concerns of overwhelming individualized impact to zero-price costs, the Northern District of California in *Klein* found that the consumers' "'information and attention has material value.'"[32] The court further found the consumers adequately alleged injury related to the anticompetitive harm; if Facebook did not have a monopoly, consumers would have benefited from higher protections, less surrendering of personal information, or alterative social

[26] *See generally In re* Google Play Store Antitrust Litig., 2022 US Dist. LEXIS 213670 (N.D. Cal. 2022).
[27] *Id.* at *25.
[28] *Id.* at *49.
[29] *Id.* at *48.
[30] *Id.* at *50.
[31] *Id.* at *52–54.
[32] Klein v. Facebook, Inc., 580 F. Supp. 3d 743, 803 (N.D. Cal. 2022).

media platforms to choose from.[33] The allegations even placed a monetary value on consumers' information and attention costs through an approximation of Facebook's average revenue per user.[34] The consumers also used a willingness to pay structure using samples of times when Facebook paid certain users for their data.[35] While this allegation used representative samples, statistical revenues, and was deemed adequate to survive a motion to dismiss, this was not in a predominance context.[36] It should only serve as an example of what future courts should accept as common evidence under Rule 23(b)(3) for a zero-price platform antitrust class action. *Klein* provides a zero-price example of how the framework accepted *In Re Google Play Store Antitrust Litigation* could successfully be used to prove common impact. Even in a highly individualized market such as zero-price platforms, classwide evidence of an antitrust injury and common impact can be sufficiently proved for predominance through the use of economic models and averaging.

3. *Daubert* Barriers

In order for a regression analysis and statical samples to be a sufficient solution to prove common classwide impact in a zero-price platform market, the models and analysis themselves must pass *Daubert* challenges likely to be asserted. In fact, it is clear by many different courts that if the model that is relied on to prove common impact fails a *Daubert* challenge, then it will result in a failure to certify the class: "broad generalizations by market participants . . . cannot, in

[33] *Id.* at 803–805.
[34] *Id.* at 803.
[35] *See Id.* at 803 ("Consumers identify examples of companies that have been willing to pay users for information and attention. Indeed, Facebook itself paid certain users 'up to $20.00 per month in return for access to those users' emails, private messages in social media apps, photos and videos, web browsing and search activity, and even location information.'") (citations omitted).
[36] *See Id.* (deciding on a motion to dismiss before class certification was decided, and injunctive relief was requested).

the absence of a proper chain of expert models, serve as common proof . . . ."[37] Models on common impact fail *Daubert* for many different reasons. One important reason is that averages cannot be used to "mask individualized injury."[38] This requires a micro-level analysis into the expert testimony, rather than simply accepting averages presented.[39] The Third Circuit suggests the court must weigh "whether the market is characterized by individual negotiations" with competing factual questions to determine if the average is credible and predict how it might "play out at trial."[40] This makes *Daubert* the strongest barrier to zero-price antitrust class actions. One solution to lessen that burden would be to use existing and established economic models based off of the classic economic theories that underly simpler and older platform markets such as televisions and newspapers.

With the flexibly applied factors of peer review and generally acceptance within its field, economic models for newer zero-price markets face an uphill battle. Still developing and relatively new behavioral economics research suggests that consumers are influenced by "free" products beyond that of the standard model.[41] The standard model assumes that as long as there are benefits, the consumer will always purchase the "free" product. Yet behaviorally, customers react differently, considering other factors as well.[42] Thus, zero-price models are novel and tend to deviate from traditional rational based assumptions in most classic economic models.[43] Furthermore, as mentioned previously, the majority of antitrust theory centers on price-focused

[37] *In re* Aluminum Warehousing Antitrust Litig., 336 F.R.D. 5, 49–50 (S.D.N.Y. 2020). *See* Laumann v. NHL, 105 F.Supp.3d 384, 398–99 (S.D.N.Y. 2015) ("Here, Dr. Noll's model was the common evidence — and the model has been excluded. Therefore, no (b)(3) class may be certified.").
[38] *In re* Lamictal Direct Purchaser Antitrust Litig., 957 F.3d 184, 194 (3d Cir. 2020).
[39] *Id.*
[40] *Id.*
[41] Newman, *supra* note 6, at 183–85.
[42] *Id.*
[43] *Id.*

theory.[44] Therefore, zero-price markets are a great deviation from "the universe of homogenous goods and static price competition that gave birth to modern analyses."[45]

The relative innovative economic modeling comes at a price of the general acceptance factor judges frequently use in *Daubert* analyses. This is especially concerning if it were to be a battle of the experts where one expert is using a well-accepted and well-known price centric model and the other uses the newer models based on behavioral economics.[46] The most well accepted economic testimony relies on a narrow definition of harm.[47] In addition to these concerns, the testability and replicability of economic modeling is uniquely hard in real world cases, but especially so in markets that may not behave "rationally."[48] While these circumstances would fail any antitrust actions if *Daubert* was always applied strictly, the complexity of zero-price models further calls the general acceptance factor into consideration.[49] With the importance of providing expert testimony and models to prove common impact and even damages, *Daubert* challenges appear to pose a high barrier to zero-price antitrust class actions.

This is not to say it is impossible for zero-price platform-based models. The Rochet-Tirole Model, discussed earlier, was published in a peer reviewed journal and has been accepted by other courts.[50] In *In Re Google Play Store Antitrust Litigation*, the Northern District of California accepted the use of the Rochet-Tirole Model after a holding concurrent expert proceeding.[51] Television and newspapers adhere to the model, with viewers and readers

[44] *Id.* at 190.
[45] *Id.* at 196.
[46] Christine P. Bartholomew, *Death by Daubert: The Continued Attack on Private Antitrust*, 35 CARDOZO L. REV. 2147, 2170–72 (2014).
[47] *Id.* at 2171.
[48] *See Id.*
[49] *Id.*
[50] *See* Jean-Charles Rochet & Jean Tirole, *Platform Competition in Two-sided Markets*, 1 J. EUROPEAN ECON. ASS'N. 990 (2003); *In re* Google Play Store Antitrust Litig., 2022 US Dist. LEXIS 213670 (N.D. Cal. 2022).
[51] *In re* Google Play Store Antitrust Litig., 2022 US Dist. LEXIS 213670, *26 (N.D. Cal. 2022).

obtaining the service for free or at a loss to the company and the profit being driven by advertisers.[52] Even though zero-price markets for social media like Facebook and TikTok are relatively new, newspaper, radio, and television are not novel economic concepts. The main difference however is that for social media there are information costs in addition to attention costs; instead of simply profiting from views, social media platforms profit from collecting, compiling, and selling personal information as well. However, even with these differences, the basic economic principles of the internet as a whole appear to be modeled off of social media, just to a greater extreme.[53] This would suggest that the core economic models that have worked for traditional and longstanding forms of zero-price goods can be applied in novel circumstances. Thus, using older forms of zero or unprofitably priced platform models may offer a solution to the general acceptance and peer review factors. This leaves *Daubert* challenges to zero-price platform models as an elevated, but not insurmountable, barrier compared to other antitrust class actions.

While simply finding that privacy was commonly impacted beyond what would be a competitive level solves part of the problem, this does not solve concern regarding measuring the damages commonly. Some class members may not be injured at all depending on their individual usage and if their information was not taken to the same extent.

[End of excerpt]

[52] *See* Jean-Charles Rochet & Jean Tirole, *Platform Competition in Two-sided Markets*, 1 J. EUROPEAN ECON. ASS'N. 990, 1015 (2003).
[53] *Id.*

Applicant Details

First Name	**Nicole**
Last Name	**Bembridge**
Citizenship Status	**U. S. Citizen**
Email Address	**nmb101@georgetown.edu**
Address	**Address** Street **1111 Army Navy Dr, Apartment 1029** City **Arlington** State/Territory **Virginia** Zip **22202** Country **United States**
Contact Phone Number	**4258021960**

Applicant Education

BA/BS From	**University of Washington**
Date of BA/BS	**June 2017**
JD/LLB From	**Georgetown University Law Center** **https://www.nalplawschools.org/employer_profile?FormID=961**
Date of JD/LLB	**June 6, 2021**
Class Rank	**School does not rank**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/Journal	**No**
Moot Court Experience	**No**

Bar Admission

Admission(s)	**District of Columbia**

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Specialized Work Experience **Appellate**

Recommenders

Berry, Thomas
tberry@cato.org
Marchese, Christopher
cmarchese@netchoice.org
6317072315
Chander, Anupam
ac1931@georgetown.edu
530-902-1555

This applicant has certified that all data entered in this profile and any application documents are true and correct.

NICOLE SAAD BEMBRIDGE
1111 Army Navy Drive Apt. 1029 Arlington, VA 22202 – (425) 802-1960 – nmb101@georgetown.edu

The Honorable Juan R. Sanchez
United States District Court for the Eastern District of Pennsylvania
James A. Byrne Courthouse
601 Market St.
Philadelphia, PA 19106

May 24, 2023

Dear Judge Sanchez:

I am writing to apply for a 2024–2025 clerkship in your chambers. I graduated from the Georgetown University Law Center as a Technology Law and Policy Scholar and Bradley Fellow in 2021. I currently work as the associate director of litigation at NetChoice.

My experience in legal writing, research, and communication skills will make me a valuable addition to your chambers. While working at the Cato Institute's Center for Constitutional Studies, I researched, wrote, and developed the legal theories for ten appellate *amicus* briefs in diverse statutory and constitutional cases. Further, in the past year I have published sixteen articles on timely civil liberties issues in publications including Time and Reason. As part of my current role at NetChoice, I explain complex internet law issues in podcasts, public debates, academic panels, and provide testimony to state legislators about constitutional and policy problems with proposed legislation.

I have spent the last two years closely involved—both as a party and as an *amicus curiae*—in six First Amendment lawsuits over freedom of speech on the internet. While I am currently responsible for managing NetChoice's legal efforts, I want to advocate for civil liberties more directly as a litigator in the next phase of my career. I know a clerkship with you would be invaluable training to become a more effective advocate.

My professional references are Clark M. Neily III, Vice President in charge of the Project on Criminal Justice at the Cato Institute (cneily@cato.org, 202-425-7499); Christopher Marchese, Director of Litigation at NetChoice (cmarchese@netchoice.org, 631-707-2315); and Thomas Berry, Research Fellow at the Cato Institute's Center for Constitutional Studies (tberry@cato.org, 443-254-6330).

Thank you for considering my application.

Respectfully,

Nicole Saad Bembridge

NICOLE SAAD BEMBRIDGE

1111 Army Navy Drive Apt. 1029 Arlington VA 22202 – (425) 802-1960 – nmb101@georgetown.edu

EXPERIENCE

NetChoice **Washington, D.C.**
Associate Director of the NetChoice Litigation Center Mar. 2023 – Present
- Draft NetChoice's amicus briefs in cases involving state action doctrine, including *Trump v. Twitter* and *Changizi v. HHS*.
- Manage legal strategy for NetChoice's six active federal lawsuits, including *NetChoice v. Paxton*. Coordinate industry-wide amicus efforts for Section 230 cases.
- Speak on panels and podcasts about NetChoice's cases, content moderation, privacy, and artificial intelligence.

Associate Counsel Oct. 2022 – Mar. 2023
- Testified in state legislatures about new bills' expected impacts on the technology industry.
- Published nine articles, blog posts, and op-eds on topics including whether the First Amendment protects generative AI outputs (publication pending) and issues with state-level internet regulations under the Dormant Commerce Clause.

Cato Institute, Robert A. Levy Center for Constitutional Studies **Washington, D.C.**
Legal Associate Sept. 2021 – Oct. 2022
- Wrote all or substantial parts of ten appellate amicus briefs on diverse constitutional and statutory questions.
- Co-authored ten op-eds and blog posts, including in USA Today, Reason, and The Hill, on timely constitutional issues.
- Co-authored policy analysis, "Moderating the Metaverse," on content moderation for multi-user VR and AR platforms.
- Wrote six formal memoranda on complex constitutional issues including interjurisdictional conflicts in regulating abortion after *Dobbs* and the First Amendment and property rights issues with applying common carrier doctrine to social media services.

Utrecht, Kleinfeld, Fiori, Partners **Washington, D.C.**
Campaign Finance Law Clerk May – Aug. 2020
- Created corporate charters, bylaws, and independent contractor agreements for 20 nonprofit corporations.
- Wrote 25 formal memoranda advising clients operating nonprofits and PACs on disclosure requirements, "vote-buying" regulations, and defamation.

The United Nations - Office of Legal Affairs **New York, NY**
Technology Law and Policy Intern May – Aug. 2019
- Wrote and presented daily analyses of international negotiations at UN headquarters to the Office of Legal Affairs.
- Published report to the General Assembly on biometric data practices in UN refugee camps (one of three reports chosen for publication out of 17 submissions).

Seattle Public Schools and Fleming School of Music **Seattle, WA**
Jazz Band and Piano Instructor Aug. 2016 – June 2018
- Led after-school jazz band program at two public middle schools.
- Provided private piano and music theory instruction for twenty students of all ages.

EDUCATION

Georgetown University Law Center **Washington, D.C.**
Juris Doctor – 3.38 GPA May 2021
Allen and Erika Lo Endowed Technology Law and Policy Scholar
Bradley Fellow, Georgetown Center for the Constitution
Pro Bono Distinction (completed over 100 hours of law-related pro bono work before graduation)
Activities: President of Student Animal Legal Defense Fund; President of Chamber Music Society, Institute for Constitutional Advocacy and Protection Practicum, Cyberlaw Association

University of Washington **Seattle, WA**
B.A. in Economics, B.A. in Music Performance – 3.7 GPA May 2016
Activities and Awards: Music merit scholarship for years 2014-16, Study abroad: La Sorbonne (2013) and University of Cape Town (2016), Jazz Band, Mock Trial

CERTIFICATIONS AND SKILLS

Bar admission: District of Columbia; French language, advanced proficiency; Jazz and classical piano, advanced proficiency.

Georgetown Law Transcript

This is not an official transcript. Courses which are in progress may also be included on this transcript.

Record of: Nicole Saad Bembridge
GUID: 812354121
Course Level: Juris Doctor
Degrees Awarded:

Juris Doctor Jun 09, 2021

Georgetown University Law Center
Major: Law
Entering Program:
Georgetown University Law Center
Juris Doctor
Major: Law
Technology Law and Policy Scholar

---------- Fall 2018 ----------

Subj Crs Sec Title Crd Grd Pts R
LAWJ 001 93 Legal Process and Society 2.50 IP 0.00
Lawrence Solum

LAWJ 002 93 Bargain, Exchange & Liability 3.00 IP 0.00
David Super

LAWJ 005 31 Legal Practice: Writing and Analysis 2.00 IP 0.00
Jessica Wherry

LAWJ 007 31 Property in Time 4.00 B+ 12.00
Daniel Ernst

LAWJ 009 33 Legal Justice Seminar 3.00 A 9.99
Lisa Heinzerling

EHrs QHrs QPts GPA
Current 7.00 7.00 21.99 3.43
Cumulative 7.00 7.00 21.99 3.43

---------- Spring 2019 ----------

Subj Crs Sec Title Crd Grd Pts R

LAWJ 001 93 Legal Process and Society 5.00 B 15.00
Lawrence Solum

LAWJ 002 93 Bargain, Exchange and Liability Part II: Risks and Wrongs 6.00 B 18.00
David Super

LAWJ 003 93 Democracy and Coercion 4.00 B+ 12.00
Allegra McLeod

LAWJ 005 31 Legal Practice: Writing and Analysis 4.00 A 16.00
Kristen Tiscione

LAWJ 008 93 Government Processes 4.00 B 12.00
Jonathan Molot

EHrs QHrs QPts GPA
Current 23.00 23.00 73.00 3.29
Annual 30.00 30.00 94.99 3.31
Cumulative 30.00 30.00 94.99 3.36

---------- Fall 2019 ----------

Subj Crs Sec Title Crd Grd Pts R

LAWJ 038 05 Antitrust Economics and Law 4.00 B+ 12.00
Steven Salop

LAWJ 1516 05 Tech Law Scholars Seminar II 1.00 IP 0.00
Alexandra Givens

LAWJ 165 09 Evidence 4.00 B 12.00
Michael Pardo

LAWJ 215 09 Constitutional Law II: Individual Rights and Liberties 4.00 B+ 12.00
Randy Barnett

EHrs QHrs QPts GPA
Current 12.00 12.00 36.00 3.18
Cumulative 42.00 42.00 130.99 3.26

---------- Spring 2020 ----------

Subj Crs Sec Title Crd Grd Pts R

LAWJ 1359 05 Constitutional Interpretation Seminar: Originalism and its Rivals 2.00 P 0.00
Louis Seidman

LAWJ 1491 101 ~Seminar 1.00 P 0.00
Arun Rao

LAWJ 1491 102 ~Fieldwork 2cr 2.00 P 0.00
Arun Rao

LAWJ 1491 27 Externship I Seminar (J.D. Externship Program) NG
Arun Rao

LAWJ 1516 05 Tech Law Scholars Seminar II 2.00 P 0.00
Alexandra Givens

LAWJ 342 05 Information Privacy Law 3.00 P 0.00
Anupam Chander

LAWJ 433 05 Trademark and Unfair Competition Law 3.00 P 0.00
Julie Cohen

LAWJ 635 08 Federal Money: Policymaking and Budget Rules 3.00 P 0.00
Timothy Westmoreland

Mandatory P/F for Spring 2020 due to COVID19

EHrs QHrs QPts GPA
Current 16.00 0.00 0.00 0.00
Annual 27.00 12.00 36.00 3.18
Cumulative 58.00 42.00 130.99 3.26

---------- Fall 2020 ----------

Subj Crs Sec Title Crd Grd Pts R

LAWJ 060 01 Civil Litigation Practice W
Coleman Bird

LAWJ 121 07 Corporations 4.00 P 0.00
Charles Davidow

LAWJ 1710 05 Campaign Finance 1.00 B+ 3.33
Richard Hasen

LAWJ 195 05 Election Law: Voting, Campaigning and the Law 3.00 B 9.00
Paul Smith

LAWJ 361 03 Professional Responsibility 2.00 B 6.00
Stuart Teicher

LAWJ 567 05 Animal Protection Litigation NG
Ralph Henry

LAWJ 567 81 Anim Protectn Litg~~Sem 2.00 P 0.00
Ralph Henry

LAWJ 567 82 Anim Protectn Litg~~Field Work 2.00 P 0.00
Ralph Henry

EHrs QHrs QPts GPA
Current 14.00 6.00 18.33 3.06
Cumulative 72.00 48.00 149.32 3.33

---------- Spring 2021 ----------

Subj Crs Sec Title Crd Grd Pts R

LAWJ 052 05 Fourteenth Amendment Seminar 3.70 A- 9.99
Louis Seidman

LAWJ 060 01 Civil Litigation Practice W
Coleman Bird

LAWJ 1601 01 Constitutional Impact Litigation Practicum (Project-Based Practicum) 5.00 B 15.00
Mary McCord

LAWJ 1626 05 Internet Law 2.00 A- 7.34
Anupam Chander

LAWJ 360 05 Legal Research Skills for Practice 1.00 P 0.00
Rachel Jorgensen

LAWJ 586 05 Race and American Law 4.00 A 16.00
Sheryll Cashin

---------- Transcript Totals ----------

EHrs QHrs QPts GPA
Cumulative 87.00 62.00 197.65 3.38

---------- End of Juris Doctor Record ----------

May 24, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

My name is Thomas Berry, and I'm a research fellow in the Cato Institute's Robert A. Levy Center for Constitutional Studies. I write to wholeheartedly and unreservedly recommend Nicole Saad Bembridge for a clerkship in your chambers.

For the past year, Nicole has served as a legal associate in our Center, essentially a one-year fellowship. In many ways, our program is similar to a clerkship: our 2 to 4 associates per year work closely with me and other scholars in the center in evaluating cases, deciding whether and how to write amicus briefs, and then drafting and editing those briefs. I have been one of Nicole's supervisors in this work, and her performance has been exemplary.

By definition, every case we work on at the center is difficult and novel. We don't directly litigate; we focus entirely on filing amicus briefs in cases where it is most likely that our perspective could make a difference. That means our associates work on amicus briefs at the Supreme Court merits stage, appellate court merits stage, and supporting petitions for cert. These briefs are on constitutional or statutory issues that are unsettled and in sharp dispute. This work requires associates who are not afraid to tackle difficult questions, who are creative in developing original ideas, and who have the work ethic to synthesize many cases and secondary sources to find the most useful ideas.

Nicole has demonstrated all of these skills with aplomb. It is clear that rather than being intimidated by cutting edge and unsettled issues, she is excited by them. For example, we have worked closely on multiple briefs related to the First Amendment rights of online platforms and the constitutionality of state laws regulating platform moderation rules. In the course of those projects, Nicole has worked tirelessly to find and review literature and cases on compelled speech and distill those debates down to the relevant principles for the current disputes. She has enthusiastically tackled the work of condensing this material down into useful memos, helping both of us work through the options for our briefs. She has shown excellent judgment in culling good arguments from bad, evaluating the pros and cons of various strategies, and anticipating the strongest arguments for the other side.

I had the honor of clerking for Judge E. Grady Jolly of the Fifth Circuit, and so I have seen the skills necessary for a successful clerkship. I know that a good clerk must present her own views clearly and forcefully, but also present competing views just as fairly. And once a decision has been made on how to proceed, a good clerk must serve as a faithful agent for the judge in the opinion drafting process. Nicole's performance as an associate has demonstrated all of these skills. She has been clear and forceful in her recommendations, but also excellent at translating my suggestions and instructions into the drafts for our briefs. In working with my colleague on issues related to the dormant commerce clause, she has been similarly excellent at acknowledging the weaknesses and uncertainties on both sides of the issue and helping to develop our own institutional position.

Finally, besides her legal acumen and judgment, Nicole has been a delight to work with and to have as an officemate. She has an excellent sense of humor and is always in a good mood. I know that during a clerkship a pleasant personality is just as important as good work, because clerks and judges must work in close quarters and remain in good humor. Nicole has made the Cato office a congenial and amusing place to work for the last year, and I have no doubt she would do the same for your chambers.

I would be happy to speak further about Nicole's work and answer any questions you may have, so please don't hesitate to contact me at tberry@cato.org or (443) 254-6330.

Sincerely,

Thomas Berry

Research Fellow, Robert A. Levy Center for Constitutional Studies, Cato Institute

1000 Massachusetts Ave. NW, Washington, DC 20001

Christopher J. Marchese
Director of Litigation, NetChoice
1401 K St. NW, Suite 502
Washington, D.C. 20002
(631) 707-2315

To Whom It May Concern:

I am pleased to recommend Nicole Saad Bembridge to serve as a judicial clerk. As Director of Litigation at NetChoice, a trade association committed to defending free speech and free enterprise online, I have had the pleasure of working alongside Nicole since 2021. Together, we run the technology industry's first litigation center and oversee blockbuster lawsuits, including two pending at the Supreme Court—*NetChoice v. Moody* and *NetChoice v. Paxton*. Nicole has been an invaluable partner in launching and managing the Litigation Center, managing our amicus program and lawsuits, and strategizing which suits to bring, where, when, and with what claims. Nicole's experience and expertise, coupled with her sunny personality and professional demeanor, make her an ideal candidate for your chambers.

That Nicole has been a standout success comes as no surprise. Before she joined our team, Nicole ran the Cato Institute's amicus program and authored or helped author Cato's influential, well-written amicus briefs. At NetChoice, she applied those skills to launching our amicus program, authoring amicus briefs in house, coordinating coalition briefs, and working with outside counsel to develop and hone arguments. Nicole also plays an active role in managing our ongoing litigation, including drafting and editing court filings, distilling complex legal issues into crisp, easy-to-understand explainers for the public and press, and managing amici both in our cases and in industry cases. In sum, she excels across the board.

Nicole's analytical rigor and precision skills are unmatched. Given the often novel questions raised by the internet, Nicole takes great care to hone and frame our constitutional and statutory arguments so that courts have a clear sense of how bedrock precedents or pre-digital statutory terms apply in digital contexts. So, too, when NetChoice advances novel arguments itself—like when Nicole had to carefully thread the needle in our amicus brief in *Changizi v. HHS*, a case pitting the First Amendment rights of social media users against the rights of social media businesses. Nicole persuasively argued that the First Amendment vindicates both and explained how.

Nicole's commitment to excellence has rightfully earned her praise from all corners. On top of everything else, Nicole briefs general counsel and litigation teams at member businesses—including the country's most valuable technology companies. Without fail, Nicole's presentations earn well-deserved recognition. She stands out even in an industry awash with lawyers.

Nicole is a professional asset and a wonderful colleague. She is dedicated, personable, and enjoyable to be around. She is meticulous and—most important here—Nicole is committed to getting the law right. No doubt your chambers would quickly conclude the same.

Respectfully,

Christopher J. Marchese

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

May 24, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

With the greatest enthusiasm, I write to commend Nicole Saad Bembridge to you for a judicial clerkship.

A 2021 graduate of Georgetown Law, Ms. Bembridge accomplishments far exceed those of all but few lawyers. Her career as a very junior lawyer is simply astonishing. She wrote all or substantial parts of 12 amicus briefs for the Cato Institute or NetChoice. These are briefs that raise critical questions about how to manage the modern speech environment, which is mediated not just by newspapers, television, and movies, but also by YouTube, Facebook, TikTok, Twitter, and Parler. In her briefs, she has sought to avoid giving the government power to create a Ministry of Truth, or to incentivize companies to suppress speech at the hint of controversy. This is a classical liberal vision of speech, one espoused by the Warren Court. That vision is under attack, from both sides of the aisle.

I had the good fortune to teach Ms. Bembridge for two courses—Internet Law and Information Privacy. She wrote a strong exam, earning an A- in the class. Her essay for the analytical policy question on the exam on the extension of Section 230 to actions by artificial intelligence was particularly superb. The Information Privacy course was pass-fail the year she took it because of the pandemic, and she passed. She was an active and helpful participant in discussions in both classes. She was a member of our Technology Law and Policy Scholars program, which is highly selective program.

In her work as a young lawyer, she is a sophisticated participant in the hottest legal issues involving technology law. Her amicus briefs in the NetChoice v. Paxton litigation demonstrate this. That case involves a Texas social media law that would require social media enterprises to not discriminate on the basis of viewpoint, thus requiring internet platforms to carry hate speech and disinformation, which are typically suppressed because of their problematic viewpoint. Her brief argues that a “viewpoint neutrality” moderation rule leads to the proliferation of vile material online. This, in turn, will lead to an exodus of users for whom exposure to such content precludes enjoyable use. She argues that blocking the Texas social media law would protect the public interest in beneficial use of the platforms. Texas, a second brief in the case argues, would effectively be seizing control of private media platforms in order to guarantee that they host the speech the government prefers. In doing so, it undermines platforms’ speech rights and property rights at once, both “conservative” first principles.

Her volunteer work is also significant. She has provided pro bono representation for the humane treatment of animals, and also volunteered as a piano teacher at a women’s shelter in Seattle, Mary’s Place, every Saturday morning for two years (2017-2018).

On a personal level, she strikes me as a friendly person, who will get along with others in chambers.

I’m delighted to give Ms. Bembridge my strongest recommendation for a clerkship in your chambers.

Sincerely,

Anupam Chander
Scott K. Ginsburg Professor of Law and Technology

Anupam Chander - ac1931@georgetown.edu - 530-902-1555

Nicole Saad Bembridge

Legal Writing Sample I

This is an unedited version of an amicus brief I wrote in support of Ariyan, Inc.'s petition for certiorari in *Ariyan, Inc. v. Sewerage Board of New Orleans,* a case about the Just Compensation Clause, while working at the Cato Institute. The final brief is available online.

SUMMARY OF ARGUMENT

"Government is instituted to protect property of every sort" and "that alone is a just government, which impartially secures to every man, whatever is his own." James Madison, The Writings, vol. 6 (1790–1802) 101–02 (1906). Accordingly, the Fifth Amendment commands payment of just compensation when the government seizes private property for public use. U.S. Const. amend. V. Yet the Fifth Circuit interprets this command to only guarantee the right to an unenforceable judgment, payable entirely at the government's choosing.

Over four years ago, Louisiana courts entered just compensation judgments for Petitioners, a group of small business owners whose property and livelihoods were seriously damaged by a Sewerage and Water Board of New Orleans's ("Sewerage Board") construction project. App.K-5. And yet the Sewerage Board still has not paid Petitioners and shows no intent of paying anytime soon. Pet. Br. at 10. Petitioners sued in federal court, but the Fifth Circuit held that Louisiana state law bars enforcement of takings judgments. *Ariyan, Inc. v. Sewerage & Water Bd. of New Orleans*, 29 F.4th 226, 232 (5th Cir. 2022). According to the Fifth Circuit, the Sewerage Board could unilaterally withhold payment for decades, if it ever pays at all, and federal courts are powerless to do anything about it. *Id.* (noting that the panel "understand[s] the [Petitioners'] frustration" at nonpayment of their just compensation judgments but holding that the Fifth Amendment does not require federal courts to provide relief). But Petitioners' property rights cannot be contingent upon the government's largesse, and the Fifth Circuit's judgment conflicts with this Court's own interpretation of what the Constitution requires.

This Court has held that the Just Compensation Clause is self-executing and that judicial enforcement in case of nonpayment is required. *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2171 (2019) (the clause is self-executing); *Joslin Mfg. Co. v. City of Providence*, 262 U.S. 668, 677 (1923) (adequate provisions for enforcing judgments are required). Likewise, this Court has held that just compensation requires reasonably timely payment. *Bragg v. Weaver*, 251 U.S. 57, 62 (1919) (the Constitution requires compensation without unreasonable delay). This is critical: without further guidance from this Court regarding temporal limits on when just compensation is due, lower courts will continue to permit indefinite delays. For many elderly

property owners, like Petitioners, indefinite delay may be functionally equivalent to denial of just compensation entirely.

Government stonewalling to delay or outright refuse payment is a recurring problem. Several recent cases from within the Fifth Circuit alone demonstrate the frequency of the abuse. *Lafaye v. City of New Orleans,* 35 F.4th 940 (5th Cir. 2022); *Violet Dock Port Inc., LLC v. Heaphy,* No. 19-11586, 2019 WL 6307945 (E.D. La. Nov. 23, 2019). Predictably, poor and disadvantaged communities are the ones most likely to have property seized, and now, after the Fifth Circuit's ruling, they will also be more likely to go uncompensated after the government seizes their property. See generally, Steve P. Calandrillo, *Eminent Domain Economics: Should "Just Compensation" Be Abolished, and Would "Takings Insurance" Work Instead?,* 64 Ohio St. L.J. 451 (2003) (explaining that the government is incentivized to take property in poor areas for public use).

It has been nearly four decades since this Court last provided guidance on the Just Compensation Clause. See *United States v. 50 Acres of Land*, 469 U.S. 24 (1984). The decision below makes clear that this lacuna has created confusion about what the clause requires—confusion that is now undermining the core guarantee of just compensation for Louisianans and others. This Court should grant review to clarify that just compensation requires both reasonable promptness and enforceability.

ARGUMENT

I. THIS COURT SHOULD GRANT REVIEW TO CLARIFY THAT THE JUST COMPENSATION CLAUSE REQUIRES MORE THAN AN UNENFORCEABLE JUDGMENT

"[A] property owner acquires an irrevocable right to just compensation immediately upon a taking[.]" *Knick* 139 S. Ct. at 2172 (citing *First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles,* 482 U.S. 304 (1987)). Yet the Sewerage Board's intransigence makes Petitioners' right to compensation illusory, and the Fifth Circuit says Louisiana law prevents federal courts from doing anything about it. *Ariyan*, Inc., 29 F.4th at 232 (finding "the core of Plaintiffs' claims is foreclosed by settled law"). In effect, this makes Petitioners' property rights contingent on the Sewerage Board's grace. After ruling that the Sewerage Board

inversely condemned Petitioners' properties for a flood control project, Louisiana courts entered just compensation judgments. App.K-9.

More than four years later, the Sewerage Board still has not paid Petitioners a cent. Pet.Br. at 10. This is not due to insufficient funds on the part of the Sewerage Board, whose "latest financial statements indicate that it possesses assets exceeding $3 billion." App.K-24. Rather, the Board's nonpayment of the judgment is discretionary—discretion which, according to the Fifth Circuit, Louisiana is entitled to indefinitely. *Ariyan, Inc.*, 29 F.4th at 232. Holding that there is no federal remedy to enforce the state court compensation judgments, the Fifth Circuit prevents an entire class of Louisiana landowners who have suffered uncompensated takings from seeking relief in federal court. This ruling will allow local government entities to hide behind state law provisions such as La. Const. art. XII, § 10(C) or La. Rev. Stat. § 13:5109 to deny or defer paying just compensation indefinitely.

The Fifth Circuit's interpretation of what the Just Compensation Clause requires runs contrary to this Court's precedents. The Court has emphasized that the clause "may not be evaded or impaired by any form of legislation," and that a landowner has "an unqualified right to a judgment for the amount of such damages, which can be enforced—that is, collected—by judicial process." *Baltimore & Ohio R. Co. v. United States,* 298 U.S. 349, 368 (1936); *Sweet v. Rechel*, 159 U.S. 380, 402 (1895). The Court has described the Just Compensation Clause as being a "self-executing," enforceable right, meaning "it supplies a sufficient rule by means of which the right given may be enjoyed and protected or the duty imposed may be enforced." *Knick,* 139 S. Ct. at 2171; *Davis v. Burke,* 179 U.S. 399, 403 (1900); see also *First English Evangelical Lutheran Church,* 482 U.S. at 316 n.9 (the Constitution "of its own force . . . furnish[es] a basis for a court to award money damages against the government").

And, critically, it has held that "the requirement of just compensation is satisfied when . . . there is adequate provision for enforcing the pledge." *Joslin Mfg. Co.,* 262 U.S. at 677. But far from recognizing a self-executing clause that requires enforcement, the Fifth Circuit allows Fifth Amendment property rights to be trumped by state procedural rules. This means that Louisiana property owners who are due just

compensation must "rely exclusively upon the generosity of the judgment debtor." *Ariyan, Inc.,* 29 F.4th at 230 (quoting *Louisiana ex rel. Folsom v. City of New Orleans*, 109 U.S. 285, 295 (1883) (Harlan, J., dissenting). But this undermines the fundamental requirement that the "Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, §2, cl. 2; Eric Berger, *The Collision of the Takings and State Sovereign Immunity Doctrines,* 63 Wash. & Lee L. Rev. 493, 498 (2006) (arguing that direct constitutional action against the state is practically necessary for the right to just compensation to have any force). Without review from this Court, Louisianans' Fifth Amendment rights will continue to be contingent on their condemnors' largesse.

A. Governments May Not Defer Payment of Compensation Indefinitely or for Unreasonable Periods of Time

When government action rises to the level of a taking, it requires compensation without indefinite delay. Accordingly, this Court has recognized as "settled" the principle that unless "adequate provision is made for the certain payment of the compensation without unreasonable delay," a taking "contravene[s] due process of law in the sense of the Fourteenth Amendment." *Bragg,* 251 U.S. at 62.

The Constitution requires "reasonably prompt ascertainment and payment" and "adequate provision for enforcing," with the landowner being "paid—and paid promptly." *Joslin Mfg. Co.,* 262 U.S. at 677–78. Finally, this Court recently emphasized that "allowing the government to keep the property pending subsequent compensation to the owner . . . was not what [the Framers] envisioned." *Knick,* 139 S. Ct. at 2176. Collectively, these cases establish that if the government fails to pay a just compensation judgment within a reasonable time, that failure represents a violation of the Fifth and Fourteenth Amendments.

B. Without a Temporal Limit on Payment, the Guarantee of Just Compensation Is Hollow

"The Founders recognized that the protection of private property is indispensable to the promotion of individual liberty." *Cedar Point Nursery v. Hassid,* 141 S. Ct. 2063, 2071 (2021). In the words of John Adams, "[p]roperty must be secured, or liberty cannot exist." *Id.* (quoting Discourses on Davila, 6 Works of John Adams 280 (C. Adams ed. 1851)). Accordingly, last term, this Court reaffirmed that "[t]he government must

pay for what it takes." *Id.* Yet because the value of the judgment to Petitioners "depends necessarily upon the remedies given for its enforcement," the Just Compensation Clause is a guarantee in name only without a court-enforceable due date. *Louisiana ex rel. Folsom v. City of New Orleans,* 109 U.S. 285, 295 (1883) (Harlan, J., dissenting).

This Court has already developed factors for determining whether government action is "reasonably prompt" in cases where satisfaction of a right depends on timeliness, as it does here. *Joslin Mfg. Co.,* 262 U.S. at 677. In *Barker v. Wingo,* this Court set out four factors for determining when a delay in providing a speedy trial exceeds constitutional bounds: length of delay, the reason for the delay, the assertion of the right, and prejudice to the person asserting a constitutional injury. 407 U.S. 514, 530–32 (1972). Courts should require no less in the context of just compensation. Fifth Amendment property rights would be relegated to a bizarre second-class status—subservient to state procedural rules—if the Fifth Circuit's ruling is allowed to stand.

This Court must clarify that a temporal limit is required if the Just Compensation Clause is to have any force at all. It is no answer for the Sewerage & Water Board to say that the compensation award is being delayed with interest accruing on that amount. This is the equivalent of saying that injured landowners should be compelled to make an involuntary loan to the government until such time as the government is ready to pay the compensation judgment. That has the effect of placing the burdens of government on the unfortunate few whose land is taken, which runs afoul of the underlying premise of the Just Compensation Clause: to prevent government from disproportionately placing burdens on a select few rather than the public as a whole. See *Monongahela Nav. Co. v. United States,* 148 U.S. 312, 325 (1893) ("[the Takings Clause] prevents the public from loading upon one individual more than his just share of the burdens of government and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him."). When landowners suffer direct or indirect condemnation of their property, as Petitioners did here, they need just compensation promptly so that they can relocate, rebuild, or repair the damage. Pet. Br. at 8. Petitioners' property damage included damaged foundations, shifting porches, broken floors, cracked interior and exterior walls, broken and shifting fireplaces, leaking roofs, and inoperable and leaky doors and windows. *Id.* An unenforceable state court

judgment is no substitute for the timely payment needed to remediate those government-inflicted damages to private property.

II. REVIEW IS NECESSARY TO STOP THE RECURRING PROBLEM OF GOVERNMENT ARBITRARILY DELAYING OR DENYING JUST COMPENSATION

The Sewerage Board is far from the first government entity to arbitrarily refuse to pay compensation. *See, e.g., Fla. Dep't of Agric. & Consumer Servs. v. Dolliver,* 283 So. 3d 953 (Fla. Dist. Ct. App. 2019) (government outright refused to pay compensation and refused to make any request to the legislature to appropriate the funds); *Archbold-Garrett v. City of New Orleans*, 893 F.3d 318, 322 n.1 (5th Cir. 2018) (city allocated funds to pay just compensation only "as they see fit"); *Vogt v. Bd. of Comm'rs,* 2001-0089 (La. App. 4 Cir. 03/27/02), 814 So. 2d 648, 653-55 (judgment creditors of levee district board could not obtain writ of seizure to satisfy just compensation judgment); *Dep't of Transp. & Dev. v. Sugarland Ventures, Inc.,* 476 So. 2d 970, 976 (La. Ct. App. 1985) (just compensation judgments may only be satisfied by appropriation of funds by state or municipal legislature); see also *Commonwealth v. Lot* No. 218-5 R/W, 9 N. Mar. I. 533 (2016) (government took property, acknowledged its obligation to pay compensation, but didn't pay for more than 20 years).

Other recent Fifth Circuit cases involving the same Louisiana laws the Sewerage Board cites illustrate the frequency of this problem. The Fifth Circuit just denied en banc review in *Lafaye v. City of New Orleans*, holding again that the government's failure to honor a judgment—even when that judgment calls for the return of personal property acquired by a government unlawfully—cannot be enforced by federal courts. 35 F.4th at 940. As a result, the Lafaye plaintiffs, who are waiting for the city of New Orleans to return traffic fines illegally collected from them over twelve years ago, will, like the Petitioners below, indefinitely be at the government's mercy.

Violet Dock Port Inc., LLC v. Heaphy concerned another arbitrary refusal of Louisiana state government to pay just compensation after a property seizure. 2019 WL 6307945 at *1. The government condemnor in that case, St. Bernard Port Harbor & Terminal District ("St. Bernard"), cited the same Louisiana state protections the Sewerage Board relies on here to argue it could not be compelled to pay the judgment due to Violet

Dock. Id; La. Const. art. XII, § 10(c); La. Rev. Stat. § 13:5109. Denied relief in state court, Violet Dock filed a Section 1983 action in federal district court, which was dismissed for failure to state a claim. *Violet Dock,* 2019 WL 6307945 at *1. A Fifth Circuit panel heard Violet Dock's appeal, and, during oral argument, the judges expressed dismay at St. Bernard's refusal to pay the judgment. *Violet Dock Port, Inc., L.L.C. v. Heaphy*, No. 19-30992, 2020 U.S. App. LEXIS 42414 (5th Cir. Dec. 29, 2020). Judge Barksdale told St. Bernard, "you've got the money. Pay up. This is really ludicrous." Oral Argument at 23:54, Violet Dock Port, Inc., L.L.C. v. Heaphy, No. 19-30992, 2020 U.S. App. LEXIS 42414 (5th Cir. Dec. 29, 2020). Judge Elrod expressed similar consternation when pressing St. Bernard for its legal position on why it had not paid the compensation judgment awarded to Violet Dock. Likewise, Judge Ho asked St. Bernard's counsel, "When is your client going to pay?" *Id.* at 19:50. Ultimately, the panel referred the appeal to mediation, which resulted in payment of the long overdue compensation. See Anthony McAuley, *Port Nola Board Approves Land Purchase for $1.5B St. Bernard Container Ship Terminal*, Nola.com (Dec. 17, 2020) (explaining that St. Bernard sold Violet Dock's property to Port NOLA for $18 million to satisfy the settlement agreement).

The Fifth Amendment's safeguards are intended to protect property "owners who, for whatever reasons, may be unable to protect themselves in the political process against the majority's will." *Kelo v. City of New London,* 545 U.S. 449, 505 (2005) (O'Connor, J., dissenting). Predictably, government stonewalling disproportionately affects the poor. *Id.* at 521–22 (Thomas, J., dissenting) (recognizing that the victims of government takings are often the poor or disadvantaged). This is because wealthy communities and special interest groups are usually the ones with the resources necessary to scream "not in my backyard" the loudest, and because the government's direct financial incentives are to procure the lowest value property possible, which is more than likely to be in poor communities. Aaron N. Gruen, *Takings, Just Compensation and Efficient Use of Land, Urban and Environmental Resources,* 33 Urb. Law. 517, 543 (2001) (supporting "public choice theory" findings that the wealthy and special interest groups exercise disproportionate influence in eminent domain decisions, distorting society's cost-benefit analysis); Calandrillo, *supra* at 518.

In the Fifth Circuit, disadvantaged Louisianans are now also more likely to be left without redress when the government unilaterally decides it will not pay. Other state constitutions and courts recognize that an

enforceable temporal limit is necessary to prevent recurring nonpayment of just compensation. See, e.g., Cal. Const. art. I, § 19 ("Private property may be taken or damaged for a public use and only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner."); Ga. Const. art. I, § 3, ("private property shall not be taken or damaged for public purposes without just and adequate compensation being first paid"); *Dep't of Trans. v. Mixon*, 864 S.E.2d 67 (Ga. 2021) (courts may enjoin road project if government has not paid compensation); *Bromfield v. Treasurer & Receiver General*, 459 N.E.2d 445, 448 (Mass. 1983) (property owners cannot be "relegated to standing idly by," with compensation being "the vague hope that on some unascertainable future date their judgment will be satisfied"). Lacking recognition of such a requirement, this will continually be the case in the Fifth Circuit.

The Just Compensation Clause is not an empty guarantee, and the Fifth Circuit's erroneous holding conflicts with this Court's own interpretation of what the clause requires. To restore force to the Just Compensation Clause and ensure redress is available for property owners arbitrarily denied the payment they are due, this Court must clarify that just compensation requires more than an unenforceable judgment.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Nicole Saad Bembridge

Legal Writing Sample II

This is an unedited version of an amicus brief I wrote in support of NetChoice's cross-petition for certiorari while working at the Cato Institute. The final brief is available online.

INTRODUCTION AND SUMMARY OF ARGUMENT

Freedom of speech—that is, the private freedom from government control—is arguably our most cherished civil liberty. That it cannot be tossed aside for short-term, populist ends "would be too obvious to mention if it weren't so often lost or obscured in political rhetoric." *NetChoice, LLC v. AG, Fla.*, 34 F.4th 1196, 1204 (11th Cir. 2022). However, it seems that the First Amendment's longstanding protections have gone out of style. From Florida to California, politicians of all stripes have introduced over 100 bills in the last year to control what content gets shared on the internet. Rebecca Kern, *Push to rein in social media sweeps the states*, Politico (July 1, 2022).[1] Though these efforts differ in form, their shared goal is to make the State the arbiter of private editorial standards—even the arbiter of truth. The political right wants the State to have power to combat alleged "censorship" of conservatives, while the left wants to prevent private platforms from hosting whatever the State considers "hate speech" or "misinformation" at a given time. evelyn douek & Genevieve Lakier, *First Amendment Politics Gets Weird: Public and Private Platform Reform and the Breakdown of the Laissez-Faire Free Speech Consensus*, U. Chi. L. Rev. Online (June 6, 2022) [hereinafter "douek & Lakier, *First Amendment Politics Gets Weird*"].[2] But giving the government power to compel, suppress, or evaluate speech does not combat censorship: it is the very *definition* of censorship. The First Amendment was expressly written to prevent such government action.

As the Eleventh Circuit noted, no one could have predicted the meteoric rise of social media platforms. *NetChoice,* 34 F.4th at 1203. Equally surprising is Florida's resurrection of communications collectivism—a dis-

[1] Available at https://politi.co/3DO2VXg.
[2] Available at https://bit.ly/3dBW2gV.

credited, politically-progressive theory of the First Amendment—ostensibly to protect the "free speech rights" of conservatives on social media platforms. News Release: Governor Ron DeSantis Signs Bill to Stop the Censorship of Floridians by Big Tech (May 24, 2021).[3] The First Amendment explicitly prohibits the government from censoring private speech and press. Turning that guarantee on its head, the communications collectivist movement of the 1960s tried to convert the First Amendment from a shield to protect private actors from government abuse into a sword for the government to wield against privately owned media platforms.

In defending the law at issue here, SB 7072, Florida recycles the communications collectivist theory to argue that it may force platforms to host certain content, prohibit them from hosting other content, and grant itself unprecedented power to demand data about protected editorial activity. Like the collectivists' efforts which preceded it—from the Fairness Doctrine to right-of-reply mandates—SB 7072 would chill platforms' protected speech, undermine their right to exclude, and violate the privacy interest private platforms have in their editorial source data. And again like the collectivists' efforts which preceded it, SB 7072 violates platforms' editorial rights.

The collateral damage from Florida's misguided efforts to promote transparency (and at least 28 currently pending bills like it) will be users' own safety and enjoyment of the platforms. Avi Asher-Schapiro, *Analysis: U.S. states take center stage in battles for control over social media,* Reuters (June 16, 2022).[4] Websites that host user-generated content of any kind face a constant battle against malicious actors. Platforms use content moderation tools, in significant part, as security measures. SB 7072's disclosure requirements will hand malicious actors

[3] Available at https://bit.ly/3Rymdmz.
[4] Available at https://reut.rs/3r6tuiw.

a blueprint to abuse the system, inviting an influx of spam and vile content.

Likewise, SB 7072's must-carry requirements give journalistic enterprises and registered political candidates carte blanche to post threats, racial slurs, and other vile content—content that would surely fall beyond Florida's understanding of suppressed "conservative" viewpoints. Pet. Br. 10. If sabotaging platforms' ability to keep their services secure and safe for users is not "unduly burdensome," it is hard to imagine what could be. *NetChoice,* 34 F.4th at 1230 (explaining that SB 7072's disclosure provisions might violate the First Amendment if NetChoice can demonstrate they are unduly burdensome).

The Eleventh Circuit correctly held that "no one has a vested right to force a platform to allow her to contribute to or consume social-media content" when it struck down SB 7072's content moderation requirements. *Id.* at 1204. However, without clarification from this Court that the First Amendment prohibits the entirety of SB 7072, political efforts to transfer editorial control to the state will continue to proliferate.

The stakes could not be higher, as illustrated by the Fifth Circuit's recent decision upholding the entirety of a Texas law regulating social media similarly to the Florida law at issue here. *Netchoice, L.L.C. v. Paxton*, 2022 U.S. App. LEXIS 26062, *93 (5th Cir. 2022). Without guidance from this Court, states will usher in a new era of dangerous regulation where government control of speech is no longer considered speech suppression, but instead speech "promotion"—unraveling decades of case law supporting editorial freedom. This will create a domestic "splinternet," where information available to users—on platforms of all sizes and ideological leanings—will become regionally divided based on which content local politicians prefer. To prevent the First Amendment from becoming a hollow guarantee in the digital age, this Court should grant certiorari.

ARGUMENT

I. FLORIDA RECYCLES A COLLECTIVIST MEDIA THEORY THAT DISTORTS THE FIRST AMENDMENT

Florida passed S.B. 7072 ostensibly to "preserv[e] First Amendment protections for Floridians" whose "conservative viewpoints" are allegedly being censored by social media companies' "far-left agenda." News Release: Governor Ron DeSantis Signs Bill to Stop the Censorship of Floridians by Big Tech (May 24, 2021). Yet in its efforts to protect conservatives from "biased silencing," Florida adopts a warped conception of the First Amendment championed by the politically-progressive communications collectivist movement in the 1960s, which argued that the government may control private communications platforms to ensure (the government's idea of) equality of access. *See generally* Robert McChesney & John Nichols, *Our Media, Not Theirs: The Democratic Struggle Against Corporate Media*, Open Media Series (2002) (explaining collectivists' efforts to assert public control over the media to control what they host). By forcing platforms to include speakers and speech they would otherwise exclude, Florida, like the communications collectivists, violates platforms' First Amendment rights.

Providing that "Congress shall make no law . . . abridging the freedom of speech," the First Amendment explicitly prohibits the government from censoring private speech and press. U.S. Const. amend. I; *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1926 (2019) ("[T]he First Amendment constrains governmental actors and protects private actors."). Turning that guarantee on its head, the communications collectivists converted the First Amendment from a shield to protect private actors from government abuse into a sword for the government to wield against privately-owned media platforms.

In an influential 1967 article, Jerome Barron attacked the "banality" of a First Amendment jurisprudence that only limits the government's interference with speech. Barron urged that the First Amendment should also address "nongovernmental obstructions to the spread of political truth" in a capitalist system, where the private media's pecuniary interests would invariably obstruct that "truth." Jerome Barron, *Access to the Press: A New First Amendment Right*, 80 Harv. L. Rev. 1641, 1643 (1967) (supporting a right for the public to access private, for-profit mass media on terms set by the government). To this end, Barron argued that "the interests of those who control the means of communication must be accommodated with the interests of those who seek a forum in which to express their point of view." *Id.* at 1656; *see generally* Owen Fiss, *The Irony of Free Speech* (1998) (arguing that the state must adopt a "democratic," rather than "libertarian," conception of the First Amendment so that it can police the private speech arena for the public interest).

Then as now, communications collectivists advocated for viewpoint neutrality requirements, right-of-reply mandates, and expansive applications of common carriage doctrine (using "public forum" or "public square" rhetoric). Jerome A. Barron, *The Telco, the Common Carrier Model and the First Amendment — The "Dial-A-Porn" Precedent*, 19 Rutgers Computer & Tech. L.J. 371, 405 (1993) (urging the rejection of editorial rights claims to ensure private communications firms do not "shed the non-discriminatory access obligations" of common carriers).

Borrowing directly, if unconsciously, from the communications collectivists' playbook, Florida now attempts to apply common carriage doctrine to social media platforms and dispense with platforms' own editorial rights. Pet. Br. 23; S.B. 7072, 2021 Leg. Sess. (Fla. 2021) ("Social media platforms have transformed into the new public town square . . . Social media platforms hold a unique place in preserving first amendment protections for all Floridians and should be treated similarly to common carriers.").

Then, to stop alleged "censorship" of conservatives, S.B. 7072 creates thirty-day cycles of censorship. The law's requirement that platforms moderate "consistently," in conjunction with its ban on changing moderation rules more than once every thirty days, forces platforms to remove (or retain) all content that is similar to material that they have previously removed (or retained) in the last thirty days under penalty of up to $100,000 per "inconsistently" removed post. Fla. Stat. § 501.2041(2)(b), (c), (6)(a) (2021).

Until Florida—and a growing number of other states with similar efforts—resurrected it, communications collectivism had fallen sharply out of favor with courts and self-identified conservatives alike, and for good reasons. *See generally* douek & Lakier, *First Amendment Politics Gets Weird* (explaining the change in conservative views on free speech after the "great deplatforming" of President Donald Trump); Adam Thierer, *The Surprising Ideological Origins of Trump's Communications Collectivism,* The Technology Liberation Front Blog (May 20, 2020) (explaining the irony of conservatives embracing "media Marxist" mandates to control social media).

Communications collectivist efforts like Florida's are incompatible with the First Amendment for several reasons. First, these efforts violate private media's First Amendment right to choose what content they host. The First Amendment is "[p]remised on mistrust of governmental power." *Citizens United v. FEC*, 558 U.S. 310, 340 (2010). The First Amendment thus "constrains governmental actors and protects private actors." *Manhattan Cmty. Access Corp.*, 139 S. Ct. at 1926. And when private media companies "disclos[e]," "publish[]," or "dissemina[e]" information, they engage in "speech within the meaning of the First Amendment." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011) (quotation marks omitted). Indeed, "The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the ex-

ercise of editorial control and judgment." *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (rejecting a right-of-reply for print media because it violates newspapers' own free speech rights); *see also Columbia Broad. System, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973) (finding that curios constitutional right of access to broadcast outlets for political advertising). Yet "rather than understanding the First Amendment to be a guardian of the private sphere of communication," as this Court has consistently interpreted it, collectivists misinterpret it to be a "guarantee of a preferred mix of ideological viewpoints." Jonathan Emord, *Freedom, Technology and the First Amendment* 24–25 (1991).

Second, in an effort to advance First Amendment "values," communications collectivism chills speech. Pet. Br. 26; *Tornillo*, 418 U.S. at 256–58 (finding that newspaper editors avoided printing controversial stories under the "right of reply" mandate and thus had their speech chilled). The Federal Communications Commission recognized this when it unanimously voted to repeal the Fairness Doctrine. *See Syracuse Peace Council v. F.C.C.*, 867 F.2d 654, 659 (D.C. Cir. 1989) ("[The Fairness Doctrine] disserves both the public's right to diverse sources of information and the broadcaster's interest in free expression. Its chilling effect thwarts its intended purpose, and it results in excessive and unnecessary government intervention into the editorial processes of broadcast journalists.").

Likewise, SB 7072's disclosure obligations will chill and distort platforms' exercise of protected editorial freedom. The law requires a platform to publish "the standards, including detailed definitions, it uses or has used for determining how to censor, deplatform, and shadow ban," and to inform its users about any changes to those rules "before implementing the changes" Fla. Stat. § 501.2041(2)(a), (c). Though sunlight can sometimes be "the best of disinfectants," this Court has acknowledged that disclosures about protected First Amendment activity are

different. *Buckley v. Valeo*, 424 U.S. 1, 67 (1976); *see generally* Eric Goldman, *The Constitutionality of Mandating Editorial Transparency*, 73 Hastings L.J. 1203 [hereinafter "Goldman, *Mandating Editorial Transparency*"] (explaining how mandatory *editorial* transparency requires higher First Amendment scrutiny than mandatory nutritional labels, because public disclosures will change platforms' editorial decisions).

When internal editorial decisions are exposed, the threat of public scrutiny and legal action coerces private media to make editorial choices they otherwise wouldn't. *Id.* For this reason, this Court has said that discovery requests for newspapers' editorial source data—unlike requests about non-First Amendment protected activity—must be narrowly tailored, rare, and made only under judicial supervision. *Id.*; *Herbert v. Lando,* 441 U.S. 153, 177–78 (1979). SB 7072 has none of those limitations. The law requires that a platform share with the general public rules and "detailed definitions" for how it exercises its editorial judgment. The law also empowers the Florida Department of Legal Affairs to conduct a far-reaching investigation of platforms' editorial data if the department "suspects" inaccurate disclosure or inconsistent moderation "is imminent, occurring, or has occurred." *Lando*, 441 U.S. at 177; Fla. Stat. § 501.2041(5).

To avoid intrusive investigations and liability for unlawful moderation under SB 7072, platforms will be coerced into making disclosures and moderating content in ways more likely to avoid Florida regulators' ire. Disclosure requirements like those in SB 7072 distort and chill platforms' exercise of editorial speech. Indeed, "without clear limits, the specter of a broad inspection authority, coupled with an expanded disclosure obligation, can chill speech and is a form of state power the Supreme Court would not countenance." *Washington Post v. McManus,* 944 F.3d 506, 511–12 (4th Cir. 2019).

II. DISCLOSURE REQUIREMENTS SABOTAGE PLATFORM SECURITY

Websites that host user-generated content of any kind face a constant battle against malicious actors, including spammers, scammers, political operatives seeking to spread propaganda, and users peddling vile content. Mike Masnick, *Very, Very Little of 'Content Moderation' Has Anything To Do With Politics,* Techdirt (May 25, 2022) (explaining that the vast majority of content moderation is to combat spam, fake accounts, and pornography, not to "censor" conservative political views).[5] Collectively, these bad actors make hundreds of thousands of attempts per year from thousands of accounts to post content including terrorist recruitment material, videos of mass shootings, or child sexual abuse material. *Id.;* Robert Gorwa, Reuben Binns, and Christian Katzenbach, *Algorithmic content moderation: Technical and political challenges in the automation of platform governance*, Big Data & Society, Volume 7, Issue 1, January-June 2020 [hereinafter "Gorwa et al., *Algorithmic content moderation*"] (explaining that Twitter alone has removed hundreds of thousands of accounts that try to spread terrorist propaganda).[6]

SB 7072 cripples a platform's ability to identify and block this content with three mutually reinforcing provisions. First, the requirement to disclose "the standards, including detailed definitions" that platforms use to identify and remove objectionable content will give bad actors a blueprint to bypass platform security. Fla. Stat. § 501.2041(2)(a). Second, a thirty-day limitation on changes to platform content moderation rules will make it impossible to address breaches—caused by the disclosure requirement—in a timeframe appropriate to protect a platform's users. *Id.;* § 501.2041(2)(c). Third, the private right of action awarding aggrieved users up to $100,000 for each instance of "inconsistent" moderation will attract a gold rush of self-interested Floridians to attempt to breach platform security, inundating Florida's courts with frivo-

[5] Available at https://bit.ly/3S9tdaB.
[6] Available at https://bit.ly/3Cdepm1.

lous claims. *Id.* § 501.2041(6)(a). Together, these provisions burden social media companies' exercise of editorial freedom by impeding their ability to curate a safe experience for users. *NetChoice,* 34 F.4th at 1209.

To combat the deluge of spam and other malicious content, platforms invest heavily in AI content moderation tools, in significant part, as security systems. Aabroo Saeed, *Microsoft's LinkedIn Is Curbing Inappropriate Profiles and Content from The Platform Via AI Technology,* Digital Information World (Jan. 24, 2020) (explaining that LinkedIn has turned to machine learning tools to better address the accelerating problem of inappropriate profiles and spam);[7] *see also* Kurt Wagner, *Facebook says it has spent $13 billion on safety and security efforts since 2016*, Reuters (Sept. 21, 2021).[8] However, bad actors always adapt to existing security measures. This forces platforms into an interminable cat and mouse game to identify and respond to innovative new means to evade detection.

For the same reason that banks do not disclose details of fraud detection, platforms do not disclose the detailed definitions and rubrics for moderation that apply to public-facing content. This includes the frequency with which a user must post to be designated as spam and the methods for identification of child sexual abuse material. Sapna Maheshwari, *On YouTube Kids, Startling Videos Slip Past Filters*, N.Y. Times (Nov. 4, 2017) (explaining how bad actors found ways to "fool" content moderation algorithms to post disturbing variations of popular children's cartoons).[9]

Florida's perception that "we must stand up to these technological oligarchs and demand transparency" misses the point. News Release: *Governor Ron DeSantis, Florida House Speaker Chris Sprowls and Senate President Wilton Simpson Highlight Proposed Legislation to Increase Tech-*

[7] Available at https://bit.ly/3UzyVEs.
[8] Available at https://reut.rs/3fcVONL.
[9] Available at https://nyti.ms/3dEp7bA.

nology Transparency in Florida (Feb. 2, 2021) (comment by Florida House Speaker Sprowls).[10] Though some bad actors will always find ways to game the system, SB 7072's transparency provisions make it much easier to breach security. Transparency requirements "assume that all users (and all consumers of the transparency reports and readers of the terms of service) are there in good faith. But they're not." Mike Masnick, *How California's 'Transparency' Bills Will Only Make It Impossible To Deal With Bad Actors: Propagandists, Disinfo Peddlers, Rejoice*, TechDirt (Aug. 1, 2022).[11] And without effective, confidential screening systems, platforms reliably become overrun with offensive content that does little to advance the civic value of free speech for self-identified conservatives or otherwise. *See, e.g.*, Mark Scott & Tina Nguyen, *Jihadists flood pro-Trump social network with propaganda*, Politico (Aug. 2, 2021);[12] Kevin Randall, *Social app Parler is cracking down on hate speech—but only on iPhones*, Wash. Post (May 17, 2021).[13]

In order to prevent reposting of material that has already been identified by content moderation policies as offensive or illegal, platforms store unique identifiers known as a hash code. Gorwa et al., *Algorithmic content moderation* at 4. Hashes are generated by a mathematical process which allows platforms to quickly compare the content of a new post to a repository of hashes of previously flagged content. *Id.* The nature of the process to create hashes causes even changes that are imperceptible to humans to generate very different hash codes. *Id.* As a result, bad actors try to evade detection by making modifications to offensive images or videos—including watermarks or cartoon images—and posting them again. *Id.* at 8. (explaining that hashes of about 800 different versions of the

[10]Available at https://bit.ly/3dzMUcO.
[11]Available at https://bit.ly/3C0xurl.
[12] Available at https://politi.co/3K6apVB.
[13] Available at https://wapo.st/3LygFG4.